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APPENDIX A

[Opinion of the Supreme Court of Florida (December 21, 2006)]

Supreme Court of Florida

No. SC03-1856

Howard A. ENGLE, M.D., et al.,
Petitioners,

vs.

LIGGETT GROUP, INC., et al.,
Respondents.

[December 21, 2006]

REVISED OPINION

PER CURIAM.

This case arises from the Third District Court of Appeal's reversal of a final judgment entered in a smokers' class action lawsuit that sought damages against cigarette companies and industry organizations for alleged smoking-related injuries. See Liggett Group, Inc. v. Engle, 853 So.2d 434 (Fla. 3d DCA 2003) (hereinafter "Engle II"). The final judgment awarded $12.7 million in compensatory damages to three individual plaintiffs and $145 billion in punitive damages to the entire class. See id. at 441. We have jurisdiction because Engle II misapplies our decision in Young v. Miami Beach Improvement Co., 46 So.2d 26 (Fla.1950). See art. V, § 3(b)(3), Fla. Const.

For the reasons explained more fully in this opinion, although we approve the Third District's reversal of the $145

billion class action punitive damages award, we quash the remainder of the Third District's decision. A majority of the Court **(Anstead, Pariente, Lewis and Quince)** holds that the compensatory damages award in favor of Mary Farnan in the amount of $2,850,000 and Angie Della Vecchia in the amount of $4,023,000 should be reinstated. However, the court unanimously agrees that the compensatory damages award in favor of Frank Amodeo must be vacated based on the statute of limitations.

Further, a majority of the Court **(Anstead, Pariente, Lewis and Quince)** concludes that Engle II misapplied our decision on the law of the case doctrine in Florida Department of Transportation v. Juliano, 801 So.2d 101, 106 (Fla. 2001); that the certification of the class action and the Phase I trial process were not abuses of the trial court's discretion; and that certain common liability findings can stand. However, we also conclude that the remaining issues, including individual causation and apportionment of fault among the defendants, are highly individualized and do not lend themselves to class action treatment. Thus, we remand with directions that the class should be decertified without prejudice to the class members filing individual claims within one year of the issuance of our mandate in this case with res judicata effect given to certain Phase I findings.

More specifically, we hold as follows:

PUNITIVE DAMAGES: We unanimously hold that the Third District erred in concluding that under Young the class action punitive damages claims were barred by the settlement agreement between the State of Florida and many of the defendants involved in the present action (Florida Settlement Agreement or FSA). However, we vacate the punitive damages award because we unanimously conclude that the punitive damages award is excessive as a matter of law.

A majority of the Court **(Anstead, Pariente, Lewis, and Quince)** also concludes that the Third District misapplied

Ault v. Lohr, 538 So.2d 454, 456 (Fla. 1989), by holding that compensatory damages must be determined before a jury can consider entitlement to punitive damages. Although Justices Lewis and Quince would allow the finding of entitlement to punitive damages to stand, a different majority of the Court **(Wells, Anstead, Pariente, and Bell)** concludes that the trial court erred in allowing the jury to make this finding during Phase I because, consistent with Ault, proof of liability, which includes both reliance and causation, is a predicate to the determination of entitlement to punitive damages.

PHASE I FINDINGS: A majority of the Court **(Anstead, Pariente, Lewis, and Quince)** concludes that the Third District erred as a matter of law in conducting a plenary review of the trial court's decision to certify the Engle Class after completion of an extended Phase I trial and after a different panel of the Third District upheld the certification.[1] This same majority concludes that it was proper to allow the jury to make findings in Phase I on Questions 1 (general causation), 2 (addiction of cigarettes), 3 (strict liability), 4(a) (fraud by concealment), 5(a) (civil-conspiracy-concealment), 6 (breach of implied warranty), 7 (breach of express warranty), and 8 (negligence). Therefore, these findings in favor of the Engle Class can stand. The Court unanimously agrees that the nonspecific findings in favor of the plaintiffs on Questions 4 (fraud and misrepresentation) and 9 (intentional infliction of emotional distress) are inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause. Therefore, these findings cannot stand. Because the finding in favor of the plaintiffs on Question 5 (civil conspiracy-misrepresentation) relies on the underlying tort of misrepresentation, this finding also cannot stand.

ARGUMENTS OF ENGLE CLASS'S COUNSEL: A majority of the Court **(Anstead, Pariente, Lewis, and**

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[1] Justices Wells and Bell would affirm the Third District as to its conclusions regarding the class action.

Quince) disagrees with the Third District's conclusion that the plaintiffs' counsel's improper arguments require reversal, but we condemn in no uncertain terms some of these arguments. We do not address the Phase II arguments because we are reversing the punitive damages award from Phase II-B and the defendants do not raise any error with respect to arguments made during Phase II-A, in which the jury determined the individual compensatory damages of three class representatives.

CLASS CERTIFICATION CUT-OFF DATE: While a majority **(Anstead, Pariente, Lewis, and Quince)** agrees that the class cannot be open-ended, we disagree with the Third District's ruling that the appropriate cut-off date for class membership is October 31, 1994, the date the class was initially certified. We conclude that the date of the trial court's November 21, 1996, order that recertified a narrower class is the appropriate cut-off date.

JUDGMENT FOR CLASS MEMBERS: Because Mary Farnan, who was diagnosed with lung cancer in April 1996, is clearly a proper member of the class, the Third District erred in reversing the compensatory verdict in favor of Farnan in the amount of $2,850,000, except as against Liggett Group Inc. and Brooke Group Holding Inc., whom the jury found to be zero percent at fault. We thus approve the Third District's conclusion that a directed verdict should be granted in favor of Liggett and Brooke.

As for Angie Della Vecchia, she was diagnosed with lung cancer in early 1997. However, at that time, it was also noted by her doctors that she had a past medical history of chronic obstructive pulmonary disease ("COPD") and significant hypertension. Because two of the diseases at issue in this case are coronary heart disease and COPD, Della Vecchia's medical records indicate that she had been suffering from a tobacco related disease prior to the time of certification and is therefore properly included as a class member. The jury specifically found that her lung disease was caused

by smoking. Thus, a majority of the Court concludes that the compensatory judgment in favor of Della Vecchia in the amount of $4,023,000 should stand, except as against Liggett and Brooke, who were found to be zero percent at fault.[2] The Court unanimously agrees with the Third District that the final judgment in favor of class representative Frank Amodeo must be reversed because all of Amodeo's claims are barred by the statute of limitations.

With the summary of this Court's holdings set forth above, we now turn to a more in-depth discussion of the background of this case and the salient issues.

FACTS AND PROCEDURAL HISTORY

On October 31, 1994, the trial court certified as a nationwide class action a group of smokers and their survivors under Florida Rule of Civil Procedure 1.220(b)(3). The class representatives on behalf of themselves, and all others similarly situated, filed an amended class action complaint seeking compensatory and punitive damages against major domestic cigarette companies and two industry organizations (hereinafter collectively referred to as "Tobacco") for injuries allegedly caused by smoking.[3]

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[2] We also note that the defendants never objected to Farnan or Della Vecchia as a proper members of the class. Although the defendants opposed the Engle Class's 1998 motion to add thirteen class representatives, which listed Farnan and Della Vecchia, their arguments focused on the timeliness of the motion and on the fact that adding thirteen new class representatives was unnecessary. The defendants did state that the brief descriptions of the proposed new class representatives that were provided by the plaintiffs did not indicate that "they would be adequate class representatives, whose claims are not time-barred." However, the defendants did not argue that any of the proposed class representatives, including Farnan and Della Vecchia, were not proper members of the class because of the class cut-off date.

[3] The cigarette companies are: R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Philip Morris Incorporated (Philip Morris

The trial court defined the class as: "All United States citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." Tobacco filed an interlocutory appeal of the trial court's order certifying the Engle Class pursuant to Florida Rule of Appellate Procedure 9.130(a)(6). See R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39, 40 (Fla. 3d DCA 1996) (hereinafter "Engle I"). On January 31, 1996, the Third District affirmed the trial court's order certifying the class but reduced the class to include only Florida smokers. See id. at 42 (striking "[a]ll United States citizens and residents" provision and substituting in its place "[a]ll Florida citizens and residents"). Tobacco's petition for review by this Court was denied. See R.J. Reynolds Tobacco Co. v. Engle, 682 So.2d 1100 (Fla. 1996).

On February 4, 1998, the trial court issued a trial plan, dividing the trial proceedings into three phases. Phase I consisted of a year-long trial to consider the issues of liability and entitlement to punitive damages for the class as a whole. See Engle II, 853 So.2d at 441. The jury considered common issues relating exclusively to the defendants' conduct and the general health effects of smoking. See id. On July 7, 1999, at the conclusion of Phase I, the jury rendered a verdict for the Engle Class and against Tobacco on all counts.[4]

U.S.A.); Philip Morris Companies, Inc.; Lorillard Tobacco Company; Lorillard, Inc.; Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company; Liggett Group Inc.; Brooke Group Holding Inc., and Dosal Tobacco Corp. The industry organizations are The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc. because of the class cut-off date.

[4] The Phase I findings were: (1) that cigarettes cause some of the diseases at issue; (2) that nicotine is addictive; (3) that the defendants placed cigarettes on the market that were defective and unreasonably dangerous; (4) that the defendants made a false or mis-

Phase II was divided into two subparts—Phase II-A and Phase II-B. Phase II-A was intended to resolve the issues of entitlement and amount of compensatory damages, if any, that the three individual class representatives—Frank Amodeo, Mary Farnan, and Angie Della Vecchia—should receive. Phase II-B was designed to result in a jury determination of a total lump sum punitive damage award, if any, that should be assessed in favor of the class as a whole.

At the conclusion of Phase II-A, the jury determined that the three individual class representatives were entitled to compensatory damages in varying amounts, which were offset by their comparative fault. The total award was $12.7 million. The jury subsequently determined in Phase II-B the lump-sum amount of punitive damages for the entire class to be $145 billion, without allocation of that amount to any

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leading statement of material fact with the intention of misleading smokers; (4)(a) that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both; (5) that all of the defendants agreed to misrepresent information relating to the health effects of cigarettes or the addictive nature of cigarettes with the intention that smokers and the public would rely on this information to their detriment; (5)(a) that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment; (6) that all of the defendants sold or supplied cigarettes that were defective; (7) that all of the defendants sold or supplied cigarettes that at the time of the sale or supply did not conform to representations of fact made by the defendants; (8) that all of the defendants were negligent; (9) that all of the defendants engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress; and (10) that all of the defendants' conduct rose to a level that would permit an award of punitive damages.

class member. Tobacco filed several post-verdict motions, including a motion at the conclusion of phase II-B for a new trial or remittitur, a motion to set aside the verdict, and for entry of judgment, and another motion to decertify the class. See Engle v. R.J. Reynolds Tobacco, No. 94-08273 CA-22 (Fla. 11th Cir. Ct. Nov. 6, 2000) (hereinafter "Engle F.J."), rev'd, 853 So.2d 434 (Fla. 3d DCA 2003).

On November 6, 2000, the trial court entered a final judgment and amended omnibus order, in which it granted judgment in Tobacco's favor in two respects. First, the trial court granted Tobacco's motion for directed verdict on a statute of limitations basis with regard to named plaintiff Frank Amodeo on the counts based on strict liability, implied warranty, express warranty, negligence, and intentional infliction of emotional distress. However, the trial court ruled that Amodeo's fraud and conspiracy claims were not time-barred. Second, the court granted Tobacco's motion for directed verdict with regard to count seven of the complaint, in which the Engle Class sought equitable relief, upon the basis that the count had previously been dismissed by the court. The court entered judgment in favor of the Engle Class on all other counts, ordered immediate payment to the individual plaintiffs, and directed Tobacco to pay the $145 billion in punitive damages into the registry of the Dade County Circuit Court for the benefit of the entire class.

According to the trial plan, in Phase III, new juries are to decide the individual liability and compensatory damages claims for each class member (estimated to number approximately 700,000). See Engle II, 853 So.2d at 442. Thereafter, the plan contemplated that the trial court would divide the punitive damages previously determined equally among any successful class members. Pursuant to the omnibus order, interest on the punitive award began accruing immediately. See id.

Tobacco filed an appeal and the Third District reversed the final judgment with instructions that the class be decertified. See id.

ANALYSIS

1. Res Judicata

A. History of the Florida Settlement Agreement and the Master Settlement Agreement

In 1995, the State of Florida and others (hereinafter "State") filed a complaint against many of the defendants involved in the present action (hereinafter "FSA Defendants").[5] This earlier action was initiated by the State under the Medicaid Third-Party Liability Act, section 409.910, Florida Statutes (1995). In its complaint, the State alleged counts of negligence, strict liability in tort, injunctive relief, various statutory and criminal violations, and violations of the Florida RICO Act. The State sought reimbursement of Medicaid monies expended in treating the victims of tobacco-related illnesses as well as other damages permitted by law, including punitive damages where available. Subsequent to the filing of the State's complaint, the circuit court granted the FSA

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[5] The named plaintiffs in the State's suit were: The State of Florida; Lawton Chiles, Jr., Individually and as Governor; the Department of Business and Professional Regulation; the Agency for Health Care Administration; and the Department of Legal Affairs. award of punitive damages.

The named defendants in the State's suit were: The American Tobacco Company; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; B.A.T. Industries, PLC; Batus Holdings, Inc.; Brown & Williamson Tobacco Corporation; Philip Morris Companies, Inc.; Philip Morris Incorporated (Philip Morris U.S.A.); Loews Corporation; Lorillard Tobacco Company; United States Tobacco Company; UST Inc.; The Council for Tobacco Research-U.S.A. Inc. (successor to Tobacco Institute Research Committee); The Tobacco Institute, Inc.; Hill & Knowlton, Inc.; British American Tobacco Co., Ltd.; and Dosal Tobacco Corp., Inc.

Defendants' motion for summary judgment and dismissed all claims by the State for punitive damages with the exception of its claim for punitive damages contained in count four of the complaint alleging only statutory and criminal violations.[6]

In 1997, the State and the FSA Defendants entered into the Florida Settlement Agreement, which resolved "all present and future civil claims against all parties to [the] litigation relating to the subject matter of [the] litigation, which [were] or could have been asserted by any of the parties [thereto]." (Emphasis supplied.) Pursuant to the terms of the FSA, in exchange for agreeing to resolve these claims, the State received $550 million for unspecified purposes, $200 million for a pilot program by the State of Florida aimed at the reduction of the use of tobacco products by minors, several billion dollars paid out over a period of time for the benefit of the State of Florida, and injunctive relief. As stated by the FSA, the monies received "constitute[d] not only reimbursement for Medicaid expenses incurred by the State of Florida, but also settlement of all of Florida's other claims, including those for punitive damages, RICO and other statutory theories." Also included in the FSA was a "Non-Admissibility" provision which provided:

> These settlement negotiations have been undertaken by the parties in good faith and for settlement purposes only, and neither this Settlement Agreement nor any evidence of negotiations hereunder, shall be offered or received in evidence in this Action, or any other action or proceeding, for any purpose

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[6] Specifically, count four contained allegations that the defendants violated the Florida Drug and Cosmetic Act, statutory provisions prohibiting the wrongful targeting of minors, statutory provisions prohibiting fraudulent practices, statutory provisions prohibiting public nuisances, and the Florida Deceptive and Unfair Trade Practices Act.

other than in an action or proceeding arising under this Settlement Agreement.

During the time period in which Florida pursued an action against the FSA Defendants, several other states also initiated actions against the FSA Defendants for similar if not identical claims. These states settled their claims against the FSA Defendants in November of 1998 when all parties to that action entered into a Master Settlement Agreement (the "MSA"). The MSA released all claims of the participating states and also included a "Non-Admissibility" provision similar to that in the FSA. Under the MSA, the FSA Defendants are required to pay certain participating states more than $200 billion over the first twenty-five years, with additional amounts to be paid in perpetuity after that.

B. Res Judicata Effect of the FSA

The Third District in this case held that the punitive damages claims of the Engle Class were precluded by the FSA. See Engle II, 853 So.2d at 467. The district court reasoned that Florida, in agreeing to relinquish its claims through the FSA, had effectively resolved a matter of general interest to all of its citizens and, therefore, the FSA was binding upon all citizens even though they were not parties to the original litigation. See id. at 468. The district court therefore concluded that the FSA's "release, and the res judicata effect of the resulting final judgment, preclude[d] the [Engle Class's] punitive-damage claims here." Id.

We agree with the Third District that whether the application of res judicata was proper is a question of law. See id. at 468. We therefore apply a de novo standard of review. See D'Angelo v. Fitzmaurice, 863 So.2d 311, 314 (Fla.2003) (stating that standard of review for pure questions of law is de novo).

The doctrine of res judicata serves an important purpose in the judicial system of this state. The foundation of res judicata is that a final judgment in a court of competent juris-

diction is absolute and settles all issues actually litigated in a proceeding as well as those issues that could have been litigated. We have explained the doctrine of res judicata as follows:

> A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

Fla. Dep't of Transp. v. Juliano, 801 So.2d 101, 105 (Fla.2001) (alteration in original) (quoting Kimbrell v. Paige, 448 So.2d 1009, 1012 (Fla. 1984)).

In Young, this Court held that citizens of the City of Miami Beach were bound by a judgment against the city that enjoined the city from asserting any interest in a particular parcel of oceanfront property. See 46 So. 2d at 30. An association of citizens of the City of Miami Beach filed an action to determine the public's interest in this parcel, which was owned by the defendant, a private corporation. See id. at 26. In holding that the claim was barred by the prior decree enjoining the City, we noted that a "judgment against a municipal corporation in a matter of general interest to all its citizens is binding on the latter, although they are not parties to the suit." Id. at 30 (emphasis supplied) (quoting 38 Am. Jur. § 728).

Similarly, in Castro v. Sun Bank of Bal Harbour, 370 So.2d 392, 393 (Fla. 3d DCA 1979), the Third District held that private parties were precluded from relitigating public nuisance and zoning violation claims that had already been settled by the State. The district court reasoned that the plaintiffs were bound by the final judgment of the prior action "irrespective of whether they were formal parties to the

. . . action" because they were "citizens of the State of Florida and the City of Miami at the time of the [prior] litigation." Id.

The district court, as well as Tobacco, relied on Young and Castro to support the position that the FSA is binding on all citizens of the State of Florida. However, in both of these cases the governmental entity was asserting interests of concern common to all of its citizens: the public's interest in oceanfront property and public nuisance and zoning violations. Application of res judicata in these contexts is supported by precedent that has established that for a State to bind its citizens as a result of litigation advanced by the State, the government must be suing in its parens patriae capacity, litigating the rights or interests common to the public at large and thereby representing the citizenry of the State. See Satsky v. Paramount Commc'ns, Inc., 7 F.3d 1464, 1470 (10th Cir.1993). The Eleventh Circuit Court of Appeals appropriately described this form of action when it stated:

> "In order to maintain [a parens patriae] action, the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest." Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez, 458 U.S. 592, 607, 102 S.Ct. 3260, 3268, 73 L.Ed.2d 995 (1982). "Parens patriae standing has been explained on the ground that the plaintiff state is not merely advancing the rights of individual injured citizens, but has an additional sovereign or quasi-sovereign interest." 17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4047 at 223 (1988). Although the Supreme Court has not expressly defined what is a "quasi-sovereign" interest, it is clear that a state may sue to protect its citizens against "the pollution of the air over its territory; or of interstate wa-

> ters in which the state has rights." 12 Moore's Federal Practice ¶ 350.02[3] at 3-20 (1993). It is equally clear, however, that a state may not sue to assert the rights of private individuals. See Alfred L. Snapp, 458 U.S. at 600, 102 S.Ct. at 3265; Pennsylvania v. New Jersey, 426 U.S. 660, 665, 96 S.Ct. 2333, 2335, 49 L.Ed.2d 124 (1976); New York by Abrams v. Seneci, 817 F.2d 1015, 1017 (2nd Cir.1987); Illinois v. Life of Mid-America Ins. Co., 805 F.2d 763, 766 (7th Cir.1986), 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction 2d § 3531.11 at 19 (1984).

Id. at 1469 (alteration in original).

In Satsky, the court analyzed an action in which a group of property owners alleged a variety of private property claims arising from the defendant's operation of a mine. See id. at 1466. The defendant claimed that a consent decree between itself and the State of Colorado precluded the plaintiffs' claims. See id. at 1467. In reversing a final summary judgment entered by the lower court for the defendant, the court held that "[t]o the extent [the] claims involve injuries to purely private interests, which the State cannot raise, then the claims are not barred." Id. at 1470. We agree with the reasoning of Satsky and with the principle that "litigation by a government agency will not preclude a private party from vindicating a wrong that arises from related facts but generates a distinct individual cause of action." Southwest Airlines Co. v. Texas Intern. Airlines, Inc., 546 F.2d 84, 98 (5th Cir.1977).

In the litigation that resulted in the FSA, the State, in support of its claim for punitive damages, alleged knowing and intentional dissemination of false, fraudulent and misleading statements to the general public by the FSA Defen-

dants in violation of section 817.41, Florida Statutes (1995).[7] In the present case, the Engle Class relied on legal theories that were based on injuries personal to the class members to support the claim for punitive damages. Since the State had no right to pursue these types of private interests on behalf of its citizens, the punitive damages claims settled by the State in the FSA, if any, were distinct from the punitive damages sought by the Engle Class in the present case.

The reasoning in In re Exxon Valdez, 270 F.3d 1215 (9th Cir.2001), is instructive. In that case, the defendants appealed a punitive damages award for claims arising out of the Exxon Valdez oil spill. See id. at 1221. The plaintiffs consisted of separate classes of commercial fishermen, Alaskan natives, and landowners affected by the spill. See id. at 1225. These distinct classes sought compensatory and punitive damages for injuries resulting from the Exxon Valdez spill. See id. The jury returned a verdict in favor of the plaintiffs which assessed $287 million in compensatory damages and $5 billion in punitive damages. See id. Exxon appealed the resulting judgment, asserting that the punitive damages award was barred by the res judicata effect of a consent decree between Exxon and the United States and the State of Alaska that settled claims in a previous action filed under the Clean Water Act. See id. at 1227. In holding that the award was not barred by the previous settlement, the court concluded that the interests asserted by the plaintiffs were distinct from those asserted by the United States and Alaska in the prior action. See id. at 1228. The court, relying on Satsky, noted that the prior consent decree addressed harms caused to the environment and the general public whereas the claims in the class action were to vindicate

[7] The State's only claim for punitive damages arose from the alleged violation of this Florida statutory provision prohibiting misleading advertising. None of the other statutory provisions alleged to be violated by the FSA Defendants in count four of the State's complaint allowed the recovery of punitive damages.

wrongs that resulted in individual injuries. See In re Exxon Valdez, 270 F.3d at 1227-28. Moreover, the court stressed that although the consent decree "released all government claims, [it] provides explicitly that 'nothing in this agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.'" Id. at 1227. The FSA expressly provided that neither the agreement itself "nor any evidence of negotiations [t]hereunder, shall be offered or received in evidence in this Action, or any other action or proceeding, for any purpose other than in an action or proceeding arising under this Settlement Agreement." The facts of In re Exxon are similar to the circumstances presented in this case and support our conclusion that the Third District erred in holding that the FSA barred the Engle Class's punitive damages claim.

2. Punitive Damages Award

Although we conclude that the Third District erred in applying the doctrine of res judicata to bar the Engle Class's punitive damages claim, we must vacate the classwide punitive damages award because we unanimously agree with the Third District that the trial court erred in allowing the jury to determine a lump sum amount before it determined the amount of total compensatory damages for the class. As a matter of law, the punitive damages award violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed. The amount awarded is also clearly excessive because it would bankrupt some of the defendants. A majority of the Court further concludes that the trial court erred in allowing the jury to consider entitlement to punitive damages during the Phase I trial. We address these issues separately.

A. Phase I Finding on Entitlement to Punitive Damages

The last question on the Phase I verdict form asked the jury to determine whether "[u]nder the circumstances of this case, . . . the conduct of any Defendant rose to a level that would permit a potential award or entitlement to punitive damages." The jury answered "yes" with respect to each of the defendants. In Phase II-B, the jury awarded a total of $145 billion in punitive damages to the class.

The Third District ruled that the trial erred in awarding classwide punitive damages "without the necessary findings of liability and compensatory damages." Engle II, 853 So.2d at 450. A majority of the Court **(Anstead, Pariente, Lewis, and Quince)** concludes that an award of compensatory damages is not a prerequisite to a finding of entitlement to punitive damages. Compensatory and punitive damages serve distinct purposes. As the United States Supreme Court has explained:

> The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (citations omitted).

Because a finding of entitlement to punitive damages is not dependent on a finding that a plaintiff suffered a specific injury, an award of compensatory damages need not precede a determination of entitlement to punitive damages. There-

fore, we conclude that the order of these determinations is not critical. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir.1986).

A different majority of the Court **(Wells, Anstead, Pariente, and Bell)** concludes that under our decision in Ault v. Lohr, 538 So.2d 454, 456 (Fla.1989), a finding of liability is required before entitlement to punitive damages can be determined, and that liability is more than a breach of duty. A finding of liability necessarily precedes a determination of damages, but does not compel a compensatory award. For example, in Ault, the jury found that the defendant had committed an assault and battery but awarded $0 in compensatory damages and $5000 in punitive damages. See id. at 455. Thus, unlike the Phase I jury in this case, the jury in Ault found that the plaintiff had proved the underlying cause of action but did not suffer any compensable damage.

Although we appeared to use "breach of duty" and "liability" interchangeably in Ault, the Court expressly adopted the principles set forth in dicta in Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla.1976). Specifically, we stated that

> [n]ominal damages are awarded to vindicate an invasion of one's legal rights where, although no physical or financial injury has been inflicted, the underlying cause of action has been proved to the satisfaction of a jury. Accordingly, the establishment of liability for a breach of duty will support an otherwise valid punitive damage award even in the absence of financial loss for which compensatory damages would be appropriate.

Ault, 538 So.2d at 455 (some emphasis supplied) (quoting Lassiter, 349 So.2d at 625-26).

In this case, the Phase I verdict did not constitute a "finding of liability" under Ault. This is evidenced by the fact that had the jury found for Tobacco on the legal cause

and reliance issues during Phase II, there would have been no opportunity for the jury to award the named plaintiffs damages of any type. In other words, Phase II findings for Tobacco on legal causation and reliance would have precluded the jury from awarding compensatory or punitive damages. It was error for the trial court to allow the jury to consider entitlement to punitive damages before the jury found that the plaintiffs had established causation and reliance.

In Phase I, the jury decided issues related to Tobacco's conduct but did not consider whether any class members relied on Tobacco's misrepresentations or were injured by Tobacco's conduct. As the Third District noted, the Phase I jury "did not determine whether the defendants were liable to anyone." Engle II, 853 So.2d at 450. It was therefore error for the Phase I jury to consider whether Tobacco was liable for punitive damages.

B. Excessiveness

Even if it were not error to determine entitlement to punitive damages in Phase I, it was clear error to allow the jury to go beyond mere entitlement and award classwide punitive damages when total compensatory damages had not been determined. Under Florida law, a trial court's determination of whether a damage award is excessive, requiring a remittitur or a new trial, is reviewed by an appellate court under an abuse of discretion standard. See St. John v. Coisman, 799 So.2d 1110, 1114 (Fla. 5th DCA 2001). However, a trial court's determination as to whether a punitive damage award exceeds the boundaries of due process as guaranteed by the Unites States Constitution is reviewed by a court under a de novo standard. See Cooper Indus., 532 U.S. at 436, 121 S.Ct. 1678.

Florida law requires that an appellate court review a punitive damages award to make certain that the manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the

malice, outrage, or wantonness of the tortious conduct. See Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So.2d 1039, 1043 (Fla.1982). Additionally, an award must be reviewed to ensure that it bears some relationship to the defendant's ability to pay and does not result in economic castigation or bankruptcy of the defendant. See Bould v. Touchette, 349 So.2d 1181, 1186 (Fla.1977).

In the past, we have not discussed whether punitive damages awards must bear some reasonable relation to compensatory damages. See Lassiter v. Int'l Union of Operating Eng'rs, 349 So.2d 622, 626 (Fla.1977); see also Ault, 538 So.2d at 456; Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530, 533 (Fla.1985); Arab Termite, 409 So.2d at 1043. For example in Arab Termite, we stated that punitive damages "are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff." 409 So.2d at 1043. However, we now hold, consistent with United States Supreme Court decisions after Ault that recognize due process limits on punitive damages, that a review of the punitive damages award includes an evaluation of the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two.

The United States Supreme Court has stated that a review of a punitive damages award must include consideration of three guideposts to determine whether the award is unconstitutionally excessive:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

State Farm Mutual Auto. Ins.Co. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (citing BMW

of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)).

The second guidepost is determinative in this case. As the United States Supreme Court has explained regarding this second factor:

> [W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. Gore, 517 U.S., at 582, 116 S.Ct. 1589 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award"); TXO [Production Corp. v. Alliance Resources Corp., 509 U.S.] at 458[, 113 S.Ct. 2711]. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In [Pacific Mutual Life Insurance Co. v.] Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24[, 111 S.Ct. 1032]. We cited that 4-to-1 ratio again in Gore. 517 U.S., at 581[, 116 S.Ct. 1589]. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. Id., at 581, and n. 33[, 116 S.Ct. 1589]. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process,

> while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, id., at 582[, 116 S.Ct. 1589], or, in this case, of 145 to 1.
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." Ibid.; see also ibid. (positing that a higher ratio might be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.
>
> In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

Campbell, 538 U.S. at 424-26, 123 S.Ct. 1513. Thus, the amount of compensatory damages must be determined in advance of a determination of the amount of punitive damages awardable, if any, so that the relationship between the two may be reviewed for reasonableness.

In this case, the district court stated that without having total compensatory damages determined it would be "impossible to determine whether punitive damages bear a 'reasonable' relationship to the actual harm inflicted on the plaintiff." Engle II, 853 So.2d at 451. We agree. The trial plan

allowed a lump sum determination of punitive damages for the entire class when compensatory damages had been determined only for the three individual class representatives. This approach does not provide a reviewing court with an adequate starting point to compare the lump sum punitive damages amount to compensatory damages to ensure there is some reasonable relationship. Accordingly, even if there was no error in allowing the Phase I jury to find entitlement to punitive damages, the classwide punitive damages award must be reversed.[8]

3. Law of the Case-Class Certification

In concluding that the Engle Class must be decertified, the Third District in Engle II ruled that the "'predominance' or 'commonality' requirement is not satisfied, where claims involve factual determinations unique to each plaintiff." 853 So.2d at 445. The district court explained that "common questions" did not predominate over individual issues because the choice of law analysis would require examination of numerous different state laws governing different individual claims. See id. at 449. The court also concluded that class representation would not be "superior" to individual suits because: (1) individualized issues of liability, affirmative defenses, and damages outweighed any common issues in the case; (2) each class member had unique and different experiences, which would necessitate litigation of substantially separate issues, including legal causation, specific medical causation, reliance, and awareness of risks; and (3)

[8] We also conclude that the punitive damages award was clearly excessive under the limitation based on ability to pay established by our precedent because it is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." Lassiter, 349 So.2d at 627. A comparison of the amounts awarded and the financial worth assigned to each company by the Engle Class's expert clearly demonstrates that the award would result in an unlawful crippling of the defendant companies.

individualized choice of law issues would cause class proceedings to be unmanageable. See id. at 445-47.

We conclude that the Third District erred in nullifying its previous affirmance of the trial court's certification order. Contrary to the Third District's conclusion, Florida Rule of Civil Procedure 1.220(d)(1) did not authorize the subsequent (and different) panel of appellate judges to simply substitute its judgment for that of the prior panel and reverse the trial court's certification order after the trial court entered its final judgment after Phase II. See Engle II, 853 So.2d at 443 n.4.

A class is normally certified at an early stage of the proceedings, certainly before trial, and typically before discovery is completed. Rule 1.220(d)(1) provides an avenue for reexamining certification if subsequent discovery shows that circumstances have changed. See Int'l Longshoremen's Ass'n, Deep Sea Local 1408 v. Fisher, 860 So.2d 1078, 1078 (Fla. 1st DCA 2003) (affirming the trial court's nonfinal order certifying a class but noting that "because the order is interlocutory, it may be revisited by the trial court should circumstances change"). Rule 1.220(d)(1) was not designed to allow a district court to decertify a class, contrary to its previous affirmance of class certification and after notice to thousands of Floridians, a two-year trial, and an entry of final judgment.

Moreover, under the doctrine of law of the case, the Third District would have been justified in reversing its previous ruling in Engle I only if it concluded that the prior ruling would have resulted in a clear manifest injustice. See Juliano, 801 So.2d at 106 ("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'") (quoting Strazzulla v. Hendrick, 177 So.2d 1, 4 (Fla.1965)).

Law of the case "requires that questions of law actually decided on appeal must govern the case in the same court and

the trial court, through all subsequent stages of the proceedings." Juliano, 801 So.2d at 105. The Third District recently reiterated the purpose of the law of the case doctrine in a decision holding that the doctrine precluded relitigation of the propriety of class action treatment: "[P]oints of law adjudicated in a prior appeal are binding in order to promote stability of judicial decisions and to avoid piecemeal litigation." State, Dep't of Revenue v. Bridger, 935 So.2d 536, 538, 539 (Fla. 3d DCA 2006) (quoting Bueno v. Bueno de Khawly, 677 So.2d 3, 4 (Fla. 3d DCA 1996)).

The law of the case applies in subsequent proceedings as long as there has been no change in the facts on which the mandate was based. Specifically, we have recognized that

> an appellate court should reconsider a point of law previously decided on a former appeal only as a matter of grace, and not as a matter of right; and that an exception to the general rule binding the parties to "the law of the case" at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons-and always, of course, only where "manifest injustice" will result from a strict and rigid adherence to the rule.

Strazzulla v. Hendrick, 177 So.2d 1, 4 (Fla. 1965). We have also cautioned that "the exception to the rule should never be allowed when it would amount to nothing more than a second appeal on a question determined on the first appeal." Id. (emphasis supplied).

We conclude that no circumstances existed that justified the subsequent panel's reconsideration of the prior Third District decision approving class certification, which all parties and the trial court relied on to govern the continuation of the class action. On this issue, the analysis of the Engle II court was flawed in several respects. First, the Engle II court ignored the trial court's pretrial ruling that only Florida law

would apply when it stated that the "choice-of-law analysis in the present case will require examination of numerous significantly different state laws governing the different plaintiffs' claims." Engle II, 853 So.2d at 449. Second, none of the cases from other jurisdictions cited by the Third District in Engle II to justify decertification was in the procedural posture of the present case.[9]

This case came before the Third District in Engle II after it had affirmed the class certification and after the conclusion of a trial on all common issues. Thus, there is no need to engage in an abstract analysis of the propriety of separate proceedings on common limited liability issues. Invalidating the completed class action proceedings on manageability and su-

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[9] See, e.g., Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir.1998) (affirming district court's decertification); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir.1996) (reversing class certification on interlocutory appeal); Estate of Mahoney v. R.J. Reynolds Tobacco Co., 204 F.R.D. 150 (S.D. Iowa 2001) (denying motion to certify class action); Badillo v. American Tobacco Co., 202 F.R.D. 261 (D. Nev. 2001) (denying motions to certify class action); Guillory v. American Tobacco Co., No. 97 C 8641, 2001 WL 290603 (N.D. Ill. Mar. 20, 2001) (denying motion to certify class action); Aksamit v. Brown & Williamson Tobacco Corp., No. C.A. 6:97-3636-24, 2001 WL 1809378 at *9 (D.S.C. Dec. 29, 2000) (denying a motion to certify class action); Thompson v. American Tobacco Co., Inc., 189 F.R.D. 544 (D. Minn.1999) (denying motion to certify class action); Insolia v. Philip Morris Inc., 186 F.R.D. 535, 546 (W.D. Wis. 1998) (denying motion to certify class action); Emig v. American Tobacco Co., 184 F.R.D. 379, 389 (D. Kan.1998) (denying motion to certify class action); Barreras Ruiz v. American Tobacco Co., 180 F.R.D. 194, 197 (D.P.R. 1998) (denying motion to certify class action); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 94 (W.D.Mo.1997) (denying motion to certify class action); Philip Morris, Inc. v. Angeletti, 358 Md. 689, 752 A.2d 200 (2000) (reversing trial court's class certification after trial plan had been established but before trial commenced).

periority grounds after a trial has occurred does not accord with common sense or logic.

Of course, this Court is not bound by the Third District's law of the case. See Juliano, 801 So.2d at 105 ("The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings."). Nevertheless, we conclude that the trial court did not abuse its discretion in certifying the class. See Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 829 So.2d 928, 929 (Fla. 4th DCA 2002) ("The trial court's order certifying the class is subject to review under an abuse of discretion standard."); Bouchard Transp. Co. v. Updegraff, 807 So.2d 768, 771 (Fla. 2d DCA 2002) ("[T]he determination that a case meets the requirements of a class action is a factual finding that is within the trial court's discretion and will be reversed on appeal only if an abuse of discretion is shown.").

4. Three-Phase Trial Plan—Decertification

We agree with the Third District that problems with the three-phase trial plan negate the continued viability of this class action. We conclude that continued class action treatment for Phase III of the trial plan is not feasible because individualized issues such as legal causation, comparative fault, and damages predominate. See Fla. R. Civ. P. 1.220(b)(3) ("A claim or defense may be maintained on behalf of a class if the court concludes that the prerequisites of subdivision (a) are satisfied, and that ... the claim or defense is not maintainable under either subdivision (b)(1) or (b)(2), but the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class . . . .").

Florida Rule of Civil Procedure 1.220(d)(4)(A) provides that "[w]hen appropriate ... a claim or defense may be brought or maintained on behalf of a class concerning particular issues." Although no Florida cases address whether it is appropriate under rule 1.220(d)(4)(A) to certify class treatment for only limited liability issues, several decisions by federal appellate courts applying a similar provision in the Federal Rules of Civil Procedure provide persuasive authority for this approach.

Federal Rule of Civil Procedure 23(c)(4)(A) provides that "[w]hen appropriate ... an action may be brought or maintained as a class action with respect to particular issues." In determining whether the predominance requirement of Federal Rule of Civil Procedure 23(b)(3)[10] has been met, several United States Courts of Appeals have concluded that under federal rule 23(c)(4)(A) a trial court can properly separate liability and damages issues, certifying class treatment of liability while leaving damages to be determined on an individual basis. See Olden v. LaFarge Corp., 383 F.3d 495, 509 (6th Cir.2004) (stating that the district court can properly "bifurcate the issue of liability from the issue of damages, and if liability is found, the issue of damages can de decided by a special master or by another method"); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir.2004) (noting that "Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues"); In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 139-41 (2d Cir.2001) (noting that "[c]ommon issues may predominate when liability can be determined on a class-wide

[10] Federal rule 23(b)(3) is similar to Florida rule 1.220(b)(3) and provides in pertinent part that "[a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition ... the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

basis, even when there are some individualized damage issues" and that "[t]here are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action"); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir.1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."); see also Slaven v. BP America, Inc., 190 F.R.D. 649, 658 (C.D. Cal. 2000) (maintaining class status "solely for the determination of liability" and stating that "[i]f plaintiffs prevail on the liability portion of their case, the Court will determine the appropriate method of adjudicating causation and damages issues at that juncture").[11]

The Second and Seventh Circuits have also stated that the determination that class treatment of damages issues is inappropriate can be made after a finding on liability. See Carnegie, 376 F.3d at 661 (explaining that one option available to the district courts for solving problems created by the presence in a class action litigation of individual damages is-

[11] But see Castano v. American Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir.1996) (concluding that the interaction of (b)(3) and (c)(4) requires that "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial"). Both the Second and Fourth Circuits have noted the conflict on this issue. See Gunnells v. Healthplan Services, Inc., 348 F.3d 417, 444 (4th Cir.2003) ("[T]here is a circuit conflict as to whether predominance must be shown with respect to an entire cause of action, or merely with respect to a specific issue, in order to invoke (c)(4)."); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 167 n.12 (2d Cir.2001) (noting that "an alternate understanding of the interaction of (b)(3) and (c)(4) to that set forth in Castano has been advanced elsewhere").

sues is to decertify the class after the liability trial); Visa Check/MasterMoney Antitrust Litigation, 280 F.3d at 141 (same). In Carnegie, the Seventh Circuit discussed the manageability of a class action alleging RICO violations and explained:

> Often . . . there is a big difference from the standpoint of manageability between the liability and remedy phases of a class action. The number of class members need have no bearing on the burdensomeness of litigating a violation of RICO. Whether particular members of the class were defrauded and if so what their damages were are another matter, and it may be that if and when the defendants are determined to have violated the law separate proceedings of some character will be required to determine the entitlements of the individual class members to relief. That prospect need not defeat class treatment of the question whether the defendants violated RICO. Once that question is answered, if it is answered in favor of the class, a global settlement . . . will be a natural and appropriate sequel. And if there is no settlement, that won't be the end of the world. Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues.

376 F.3d at 661 (citations omitted). In Visa Check/MasterMoney Antitrust Litigation, the Second Circuit concluded that the district court adequately addressed individual issues that might arise from certifying the class by specifically recognizing "its ability to modify its class certification order, sever liability and damages, or even decertify the class if such an action ultimately became necessary." 280 F.3d at 141.

In this case, the Phase I trial has been completed. The pragmatic solution is to now decertify the class, retaining the

jury's Phase I findings other than those on the fraud and intentional infliction of emotion distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. Class members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials. See Daenzer v. Wayland Ford, Inc., 210 F.R.D. 202, 205 (W.D. Mich. 2002) (entering summary judgment on the issue of liability, decertifying the class on the issue of damages and stating that "[t]he Court's decision as to liability is res judicata in any damages action individual class members decide to bring"); McCormack v. Abbott Labs., 617 F.Supp. 1521 (D. Mass. 1985) (concluding that plaintiff's strict liability claim was barred by judgment for the defendants entered in a prior class action, which the plaintiff joined, before that class action was decertified).[12]

We disagree with Justice Wells' conclusion that bifurcating the trial in this manner violates article I, section 22 of the Florida Constitution. See concurring in part and dissenting in part op. at 1285-87. We recognize the concerns expressed by the Fifth Circuit Court of Appeals in Castano v. American Tobacco Co., 84 F.3d 734, 750 (5th Cir.1996), in which that court held that bifurcation of issues in a nationwide smoking class action violated the Seventh Amendment to the United

[12] Justice Wells asserts that allowing limited Phase I findings to stand sets "harmful and confusing precedent." Concurring in part and dissenting in part op. at 1284. However, the procedural posture of this case is unique and unlikely to be repeated. Further, many of the questions posed by Justice Wells are answered in this opinion. As we state in both the opening and closing of the opinion, class members (i.e. those individuals who fit the class description as of the November 21, 1996, cut-off date) must file individual actions against the defendants within one year of the issuance of this Court's mandate to benefit from the Phase I finding we uphold herein.

States Constitution.[13] However, subsequent to its decision in Castano, the Fifth Circuit held that the risk of infringing on the parties' Seventh Amendment rights is not significant and is in fact avoided where the liability issues common to all class members are tried together by a single initial jury, and issues affecting individual class members such as causation, damages, and comparative negligence are tried by different juries. See Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 628-29 (5th Cir.1999). Recognizing that it had previously reached a different conclusion in Castano, the Fifth Circuit explained that the circumstances of Castano were distinct from those present in Mullen:

> In Castano, we were concerned that allowing a second jury to consider the plaintiffs' comparative negligence would invite that jury to reconsider the first jury's findings concerning the defendants' conduct. We believe that such a risk has been avoided here by leaving all issues of causation for the phase-two jury. When a jury considers the comparative negligence of a plaintiff, "the focus is upon causation. It is inevitable that a comparison of the conduct of plaintiffs and defendants ultimately be in terms of causation." Lewis v. Timco, Inc., 716 F.2d 1425, 1431 (5th Cir.1983) (en banc); see id. (permitting the use of comparative negligence in strict liability claims). Thus, in considering comparative negligence, the phase two jury would not be reconsidering the first jury's findings of whether Treasure Chest's conduct was negligent or the [vessel] unseaworthy, but only the degree to which those con-

[13] When this Court has interpreted article I, section 22 of the Florida Constitution, it found guidance in the Seventh Amendment of the United States Constitution while recognizing that the Seventh Amendment does not apply to actions brought in state court. See Dep't of Revenue v. The Printing House, 644 So.2d 498, 500 (Fla. 1994).

> ditions were the sole or contributing cause of the class member's injury. Because the first jury will not be considering any issues of causation, no Seventh Amendment implications affect our review of the district court's superiority finding.

Mullen, 186 F.3d at 628-29 (emphasis supplied).

The Fifth Circuit's reasoning in Mullen is persuasive. In this case, although the jury decided issues common to all class members, none involved whether, or the degree to which, the defendants' conduct was the sole or contributing cause of the class members' injuries, which is the pertinent question in applying the doctrine of comparative negligence. We thus follow the reasoning of Mullen and conclude that the trial plan in this case did not violate Tobacco's rights under article I, section 22 of the Florida Constitution.

5. Arguments of Engle Class's Counsel

We conclude that, under the totality of the circumstances, reversal is not warranted based on the remarks made by the Engle Class's counsel, Stanley Rosenblatt. Nevertheless, we must again remind counsel that we will not condone improper arguments. Inappropriate jury arguments in this type of case risk wasting significant judicial resources. Here, trial counsel ventured very close to the line of reversible error on a number of occasions in his attempt to counteract opposing counsel's contentions that Tobacco acted lawfully and to communicate his message to the jury that "legal doesn't make it right." However, we conclude that under the totality of the circumstances these comments did not rise to the level of reversible error.

If the issue of an opponent's improper argument has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was "so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial." Tanner v. Beck, 907 So.2d 1190, 1196 (Fla. 3d DCA 2005); see also Murphy v.

Int'l Robotic Sys., Inc., 766 So.2d 1010, 1013 n.2 (Fla. 2000) (stating the Court's decision addressing unobjected-to argument "does not impact the legal standards applicable to consideration of the issue that has been properly preserved by objection and motion for mistrial, which remains whether the comment was highly prejudicial and inflammatory"). To justify granting a motion for a new trial based on unobjected-to improper argument, the trial court must find that the improper argument is of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments. See Murphy, 766 So.2d at 1029-30. A trial court's order granting or denying a motion for a new trial based on either objected-to or unobjected-to improper argument is reviewed for abuse of discretion. See id. at 1030-31 ("[T]he appellate court must . . . apply an abuse of discretion standard in reviewing either the trial court's grant or denial of a new trial based on the unobjected-to closing argument."); Bocher v. Glass, 874 So.2d 701, 704 (Fla. 1st DCA 2004) (reviewing a trial court's order denying a motion for rehearing based on objected-to improper argument for an abuse of discretion).

In denying Tobacco's motions for mistrial, the trial court stated:

> The Court has carefully considered the Motions for Mistrial in this cause and has determined that curative instructions to the jury and/or motions to strike have been granted as requested by the movant, for most of the motions, and in any event the cumulative effect of the alleged error, was not in the opinion of the Court, sufficient to have so influenced the jury as to affect the outcome of the case considering the length of the trial, the number of witnesses presented, the quality and quantity of the testimony, the huge amount of documentary evidence, and specifically the substance of the alleged remarks. The jury in this case rendered three verdicts, each based upon

> a mountain of evidence over a period of two years in three separate trials. The court feels confident, that although some remarks of counsel may have been uncalled for, or subject to objection, they were not so egregious as to require a new trial.

Engle F.J., No. 94-08273 CA-22 order at 17. However, the Third District held that the comments "caused irreparable prejudice and require reversal." Engle II, 853 So.2d at 458. Specifically, the district court determined that this was accomplished in two stages:

> First, by inflaming the jury with racial pandering and pleas for nullification of the law to secure entitlement to punitive damages. And second, by removing responsibility from the jury for the size of the award, through arguing the award would be subject to appellate review and that it would not be paid out in a lump sum, but rather through a payout scheme.

Id. at 459. The district court then proceeded to list all of counsel's arguments it determined were improper.

Significantly, the manner in which the district court has set forth and presented the offending argument, stringing the comments together, would certainly cause a reader to assume that the comments are prejudicial. However, this is not proper analysis for review under the totality of the circumstances. Context is crucial. To determine whether the challenged statements and arguments were in fact prejudicial, the statements cannot be evaluated in isolation but must be placed and evaluated in context. See State v. Jones, 867 So.2d 398, 400 (Fla.2004) ("[T]his Court has evaluated the prosecutor's action in context rather than focusing on the challenged statement in isolation.").

We emphasize that the duration of this trial does not mean that a comment or several comments standing alone would not warrant reversal. Nonetheless, the length of the

trial is relevant to the analysis because the alleged improper statements were not made on the same day or contained within a two- or three-hour closing argument. These statements spanned a two-year period. Some comments were made during opening statements in Phase I (liability phase) in October of 1998, some during Phase I closing argument in June of 1999, and others during the closing statements in Phase II-B (punitive damages phase) in July of 2000. Many of the alleged improper comments did not even prompt an objection by Tobacco.[14]

We begin with the Third District's conclusion that plaintiffs' counsel engaged in "racial pandering" and that the jury's "runaway" verdict was evidently one inflamed by passion and prejudice. A single reference to "race" in the Phase I opening statement was in the context of the consumer studies that the defendants conducted that divide American consumers into groups. Mr. Rosenblatt's comment that "they study races" was part of a statement about the study of the American consumer: "They study kids; they study races; they divide the American consumer into groups to sell their product." In fact, when the defense objected on the basis that those comments were "only designed to prejudice the jury," the trial court rejected this argument because that was "not the context of which it's being used." Mr. Rosenblatt then followed up with the statement that this is an industry that "divides the American consumer into groups: white, black,

[14] This Court has recognized:

> Harmfulness in this context also carries a requirement that the comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury. Passing remarks of little consequence in the scope of a lengthy trial should find little sympathy if no contemporaneous objection is voiced. The extensiveness of the objectionable material is a factor to be considered in the harmfulness analysis.

Murphy, 766 So.2d at 1029-30.

Jewish, Christian, young, old." The trial court did not abuse its discretion by determining that these statements were made in an attempt to show how Tobacco sells its products and advertises to different groups, not to impermissibly prejudice the jury.

As to the Phase I closing argument, we agree that a series of improper remarks occurred when counsel injected race into his argument:

> Are there two sides to every question? And the immediate gut reaction is: Yeah, yeah. You want to be fair and you say: Right, there's two sides to every question. What's the other side to the Holocaust? What is the other side to slavery?

An objection was made and sustained. While one could posit that this was merely an attempt to explain to the jury that there are not always two sides, several minutes later Mr. Rosenblatt returned to a race-based theme by referring to Rosa Parks:

> Let's discuss the concept of legal in the context of America. I noticed in last week's newspaper, Rosa Parks, who is 86 years old, got the Congressional Gold Medal because in 1955 . . . .

Mr. Rosenblatt got no further because an objection was made and sustained. Undaunted by the trial court's ruling, Mr. Rosenblatt continued:

> We look back in history. We look back in history. The whole civil rights movement of the '60s was fighting against unjust laws. Dr. King was arrested in the '60s . . . .

An objection was made and overruled and Mr. Rosenblatt continued:

> In this building, in this building, a temple to the law, they were—there were drinking fountains which said Whites Only.

Once again, an objection was made and overruled.

There is absolutely no justification for this series of remarks, which appears to compare the tobacco industry with slavery and, by invoking civil rights leaders Rosa Parks and Martin Luther King, appealed to the jury's sense of outrage for the injustices visited upon African-Americans in this country. We condemn these tactics of Mr. Rosenblatt. His attempt to incite racial passions was conduct unbecoming an attorney practicing in our state courts.

Nevertheless, we note that the trial court sustained objections to several of these remarks and no motion for mistrial was made or curative instruction requested. In addition, there was no further race-based argument during the remainder of the closing, and, significantly, no such references were made in any of Mr. Rosenblatt's Phase I rebuttal argument.

We next discuss the Third District's conclusion that Mr. Rosenblatt's Phase I closing argument was also replete with impermissible references to jury nullification. The relevant comments were made in response to Tobacco's preemption defense: that the warnings on the cigarettes were as provided by law. Although compliance with the federal warnings preempted any claim based on failure to warn, it did not eliminate the other causes of action that the jury had to consider in Phase I. As for the comment "legal don't make it right," Mr. Rosenblatt was referring to the answers given by the CEO for Brown & Williamson, Nick Brookes. Mr. Brookes was asked what he would do with his product if he became convinced that cigarettes caused cancer and heart disease. His reply was it would not affect his business because "it's a legal product." Mr. Rosenblatt's response was that "legal don't make it right." No objection was made. In fact, this theme continued in rebuttal when Mr. Rosenblatt explained without objection:

> It's a legal product. There is no question about it. But a legal product does not mean that the cigarette

> companies are not responsible when their product causes harm and death to their customers. And being legal is a very relative term.

These arguments were not an attempt to tell the jury to ignore the law.

We conclude, under the totality of the circumstances, including that several objections were sustained and a number of the arguments were unobjected-to, that the defendants did not sustain their burden of proving reversible error under Murphy or that the trial court abused its discretion in denying the motion for new trial as to Phase I. As to Phase II, we note that no arguments have been raised as to impermissible comments during Phase II-A, in which the jury determined compensatory damages as to the three class representatives. Moreover, a review of the verdicts reveals that each verdict reflected a careful and differentiated analysis as to comparative fault and individual damages and in no way justifies the Third District's overall conclusion that this was a runaway jury inflamed by race because of the arguments directed to the four of the six members of the jury who were African-American. As to Phase II-B, because we are reversing the punitive damages award we do not separately review each of these arguments except to again note that no race-based arguments were made.

6. Reversal of Final Judgments in Favor of the Three Class Representatives

The issue of whether two of the three Engle Class representatives are properly included within the class as certified by the trial court and approved on appeal involves the application of the law to a set of undisputed facts. "[W]here the facts are essentially undisputed, the legal effect of the evidence will be a question of law." Town of Palm Beach v. Palm Beach County, 460 So.2d 879, 882 (Fla. 1984). Questions of law are reviewed de novo.

The trial court originally certified this class on October 31, 1994. This order provided for notice to the members of the class by way of publication and indicated that the trial court was to hold an additional hearing "to discuss the content, timing and manner of providing notice." At that time, the class was described as:

> All United States citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine. The class shall specifically exclude officers, directors and agents of the [d]efendants.

Engle I, 672 So.2d at 40. The class certification was affirmed by the Third District on January 31, 1996, but the class membership was altered by the district court to include only Florida citizens and residents. See id. at 42. Subsequent to the district court's modification limiting the class to Florida citizens, the trial court issued an amended order on November 21, 1996, recertifying the more limited class.

The final class description could lead one to believe that the class is open-ended because there is no stated cut-off date for membership. However, an open-ended class would not allow for notice and an opportunity to opt out as required by rule 1.220(d)(2) and may implicate potential class members' right of access to the courts under article I, section 21 of the Florida Constitution.

Further, without the ability to opt out, potential plaintiffs could argue that they should be allowed to intervene after a judgment in favor of the class or, alternatively, that they are not bound by an adverse judgment. Cf. Katz v. Carte Blanche Corp., 496 F.2d 747, 759 (3d Cir.1974) (explaining that prior to the adoption of Federal Rule of Civil procedure 23(c)(2) some courts suggested that "it would be proper to make the class action determination and permit class members to intervene after the defendant's liability had been de-

termined in the single lawsuit," that this "one-way intervention had the effect of giving collateral estoppel effect to the judgment of liability in a case where the estoppel was not mutual," and that the notice and opt-out provisions were adopted to give mutual estoppel effect to the judgment on liability). A finite class is necessary to avoid multiple similar lawsuits and to make legal process more effective and expeditious, important goals of a class action suit. See Tenney v. City of Miami Beach, 152 Fla. 126, 11 So.2d 188, 189 (1942) ("The very purpose of a class suit is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist.").

The plain language of the class certification indicates that the trial court anticipated that the class would be cut off or limited to the date of final certification. The phrase "who have suffered, presently suffer or have died" supports the view that the class should include only those people who were affected in the past or who were presently suffering at the time the class was recertified by the trial court. Moreover, although not controlling, federal case law supports the interpretation that the date of final class certification should be presumed the proper cut-off date for class membership. See Sosna v. Iowa, 419 U.S. 393, 403 (1975) ("A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court.") (citing Bailey v. Patterson, 369 U.S. 31 (1962)); Davis v. Ball Mem'l Hosp. Ass'n, 753 F.2d 1410, 1420 (7th Cir.1985) ("To be a proper class representative, the named plaintiff must be a member of the class at the time the class action is certified.").

In our view, it is reasonable to conclude that the cut-off date for class membership is November, 21, 1996, the date the trial court recertified the class and issued an amended order conforming the class description to the Third District's decision. It was with this November 21, 1996, order that the

circuit court first ordered that notice to potential class members be published in newspapers and magazines circulated in Florida. The language employed by the United States Supreme Court in Sosna, although not addressing a scenario such as we face today, is not contrary to our conclusion.

Relying upon Davis v. Ball Memorial Hospital Association, the district court held that "[s]ince Farnan was diagnosed in April 1996, and Della Vecchia was diagnosed in February 1997, they are clearly excluded from the class and the judgment in their favor must be reversed." Engle II, 853 So.2d at 454 n. 23 (emphasis supplied). However, "diagnosis" as a qualifying factor does not appear anywhere in the description of the class certified. Rather, the class is described as those "who have suffered, presently suffer or have died from diseases and medical conditions." Engle I, 672 So.2d at 40 (emphasis supplied). The critical event is not when an illness was actually diagnosed by a physician, but when the disease or condition first manifested itself.

Our review of the medical records demonstrates that class representative Farnan was formally diagnosed with lung cancer in March of 1996, clearly demonstrating her disease had manifested by that time. Therefore, she was a proper member of the class at the time of the circuit court's November 21, 1996, order. As for class representative Della Vecchia, it was noted by her doctors in early 1997 that she had a past medical history of "COPD" and significant hypertension. Thus, Della Vecchia's medical records indicate that she had been suffering from a tobacco-related disease prior to the time of certification and is also properly included as a class member. We therefore quash the district court's reversal of judgment entered in favor of class representatives Farnan and Della Vecchia and hereby order that the judgments be reinstated.

In addition to reversing the judgments in favor of Farnan and Della Vecchia, the district court also held that the judgment in favor of Tobacco should have been entered as to all

of class representative Amodeo's claims. See Engle II, 853 So.2d at 455 n.23. We agree that the district court properly held that all judgments in favor of class representative Amodeo were barred by the applicable statute of limitations.

6. [sic] Final Judgments Entered in Favor of the Three Class Representatives in Favor of Liggett and Brooke

As noted above, the final judgments entered in favor of class representative Amodeo, including those against Liggett and Brooke, must be reversed because Amodeo's claims are barred by the statute of limitations. We also agree with the Third District that the judgments against defendants Liggett and Brooke in favor of Farnan and Del Vecchia must be reversed because there was insufficient evidence to support these judgments. As the Third District explained, "it is undisputed that the Liggett defendants did not manufacture or sell any of the products that allegedly caused injury to the individual plaintiff representatives. It is also undisputed that the jury found the Liggett defendants zero percent at fault with respect to each of the named plaintiffs." Engle II, 853 So.2d at 466 n. 46. A defendant who is found to be zero percent at fault for a plaintiff's damages cannot be held jointly and severally liable for those damages. We agree with the Third District that this inconsistency in the verdict requires reversal of the judgments entered against Liggett and Brooke. See id.

CONCLUSION

In conclusion, we approve the Third District's holding that the $145 billion award of punitive damages must be vacated. However, we disapprove the Third District's conclusion that the class action punitive damages claims were barred by the FSA.

We also disapprove the Third District's holding that the trial court abused its discretion in denying Tobacco's motion for a mistrial due to improper argument by the Engle Class's counsel. We uphold the award of compensatory damages as

to plaintiffs Farnan and Della Vecchia, and approve the reversal of the entry of judgment in favor of Amodeo. However, the judgments against defendants Liggett and Brooke must reversed.

We approve the Phase I findings for the class as to Questions 1 (that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer), 2 (that nicotine in cigarettes is addictive), 3 (that the defendants placed cigarettes on the market that were defective and unreasonably dangerous), 4(a) (that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both), 5(a) (that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment), 6 (that all of the defendants sold or supplied cigarettes that were defective), (7) (that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants), and 8 (that all of the defendants were negligent). Therefore, these findings in favor of the Engle Class can stand.

The class consists of all Florida residents fitting the class description as of the trial court's order dated November 21, 1996. However, we conclude for the reasons explained in this opinion that continued class action treatment is not feasible and that upon remand the class must be decertified. Indi-

vidual plaintiffs within the class will be permitted to proceed individually with the findings set forth above given res judicata effect in any subsequent trial between individual class members and the defendants, provided such action is filed within one year of the mandate in this case. We remand this case to the Third District for further proceedings consistent with this opinion.

It is so ordered.

ANSTEAD and PARIENTE, JJ., concur.

LEWIS, C.J., concurs in part and dissents in part with an opinion, in which QUINCE, J., concurs.

WELLS, J., concurs in part and dissents in part with an opinion, in which BELL, J., concurs.

CANTERO, J., recused.

LEWIS, C.J., concurring in part and dissenting in part.

I concur in the majority's opinion and most of the reasoning employed therein. However, I cannot agree with the majority's analysis and conclusion with regard to entitlement to punitive damages. For the reasons that follow, in my view Florida law clearly requires that the jury's determination of entitlement to punitive damages which resulted in Phase I must stand.

PHASE I FINDINGS ON ENTITLEMENT TO PUNITIVE DAMAGES

Although I do agree with the majority's conclusion that the Third District misapplied our decision in Ault v. Lohr, 538 So.2d 454, 456 (Fla.1989), in holding that compensatory damages must be determined before a jury can consider entitlement to punitive damages, I cannot agree with the majority's view that the trial court erred in allowing the jury to consider the entitlement of the class to punitive damages during Phase I of the trial based on the majority's conclusion

that proof of liability, which includes both reliance and causation, is a missing predicate here to the determination of entitlement to punitive damages. For the reasons that follow, I would allow the jury's determination of punitive conduct and of entitlement to punitive damages to stand for the class to be later applied as the case proceeds.

This Court has previously addressed "whether a plaintiff can recover punitive damages where the factfinder has found a breach of duty but no compensatory or actual damages have been proven." Ault v. Lohr, 538 So.2d 454, 456 (Fla.1989). In Ault, we clearly recognized that "an express finding of a breach of duty should be the critical factor in an award of punitive damages." Id. Further, this Court has held that "a finding of liability alone will support an award of punitive damages 'even in the absence of financial loss for which compensatory damages would be appropriate.'" Id. (quoting Lassitter v. Int'l Union of Operating Eng'rs, 349 So.2d 622, 626 (Fla.1977)); see also Mortellite v. Am. Tower, L.P., 819 So.2d 928, 935 (Fla. 2d DCA 2002) (concluding that, based on the trial court's finding of breach of duty, the appellant was ultimately entitled to a punitive damage award even if, after remand, it was again determined that he was not entitled to compensatory damages); Horizon Leasing v. Leefmans, 568 So.2d 73, 75 (Fla. 4th DCA 1990) ("[A] plaintiff can recover punitive damages where the fact finder has found a breach of duty but no compensatory or actual damages have been proven.").

In this matter, Tobacco asserts, and the majority agrees, that the jury in Phase I only determined that Tobacco breached its duty and that a breach of duty does not constitute "a finding of liability" under Ault. Contrary to this assertion, the Phase I jury in the present case found Tobacco responsible with regard to the common core issues pertaining to liability and general causation. This is supported by the fact that the trial plan only allowed the jury to proceed to the next stage of Phase I-a determination of entitlement to puni-

tive damages-if liability was found. The final judgment awarding compensatory damages to the three class representatives and punitive damages to the entire class was only possible after liability was determined because a judgment for damages could not be entered if there had been no finding of liability. See Oliveira v. Ilion Taxi Aero LTDA, 830 So.2d 241, 242 (Fla. 4th DCA 2002) (recognizing "as does Ault, that as a matter of law a judgment for damages cannot be entered where there is no finding of liability"); Cont'l Assurance Co. v. Davis, 538 So.2d 542, 544 (Fla. 1st DCA 1989) (concluding that "absent the jury's finding of liability on the underlying fraud issue, there can be no valid award of punitive damages," citing Ault); Cloutier v. Cent. Contracting, Inc., 418 So.2d 1233, 1234 (Fla. 5th DCA 1982) (concluding that a verdict finding damages without finding liability cannot support the damage award). Pursuant to Ault, the jury's finding of liability and responsibility with regard to the common core issues alone in Phase I could support the jury's determination that the class was entitled to punitive damages, notwithstanding that compensatory damages have not yet been awarded to all class members. In fact, a final judgment awarding punitive damages has been affirmed notwithstanding that the judgment awarded no compensatory damages. See Russin v. Richard F. Greminger, P.A., 563 So.2d 1089 (Fla. 4th DCA 1990) (citing Ault). A finding of liability, not compensatory damages, is the sine qua non of entitlement to a punitive damage award.

In support of its argument that compensatory damages are a prerequisite for awarding punitive damages, Tobacco relies, as did the subsequent panel in Engle II, on only a concurring opinion in Ault, in which it was stated:

> The crucial element in determining whether punitive damages may be awarded absent an award of compensatory damages is proof of the underlying cause of action. Where actual damage is an essential element of the underlying cause of action, an

> award of compensatory damages must be a prerequisite to an award of punitive damages. This case involved the torts of assault and battery, which do not require proof of actual damage.

853 So.2d at 457 (Ehrlich, C.J., concurring specially). However, a majority of this Court did not agree with that statement and did not join with that concurring opinion and, therefore, it is of no precedential value whatsoever. See Greene v. Massey, 384 So.2d 24, 27 (Fla.1980) ("A concurring opinion does not constitute the law of the case nor the basis of the ultimate decision unless concurred in by a majority of the Court. . . . The special concurring opinion has no precedential value and it cannot serve to condition or limit the concurrence in the [majority] opinion. . . ."); Lindsay v. Cotton, 123 So.2d 745, 746 (Fla. 3d DCA 1960) ("A concurring opinion has no binding effect as precedent; such an opinion represents only the personal view of the concurring judge and does not constitute the law of the case."). Moreover, neither the Ault court nor any other Florida court has ever addressed Ault in the class action context. Due to the uniqueness and purpose of the class action device, which allows a jury to determine liability with regard to common issues first before determining individual damages, in my view, the jury's verdict in Phase I finding Tobacco liable with regard to the common issues is a sufficient predicate to constitute a "finding of liability" under Ault. This conclusion is supported by the fact that had the jury in Phase I found Tobacco not liable with regard to the common issues of liability and general causation each class member's claim at that point would have been rendered moot, thereby precluding Phase II.

In addition, a key factor in considering whether compensatory damages should be awarded prior to a determination of entitlement to punitive damages in a class action is whether the awarding of one is critical to awarding the other. In other words, is the relative timing of the awards the deter-

minative factor? I conclude that the timing of the awards should not be the absolute controlling factor.

Compensatory and punitive damages serve distinct purposes. See Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So.2d 1039, 1042-43 (Fla.1982). In Arab Termite we recognized the distinction between compensatory and punitive damages, specifically:

> [T]he amount of compensation for loss is an entirely separate matter from the amount of punitive damages. Punitive damages apply to wrongdoing not covered by the criminal law, where the private injuries inflicted partake of public wrongs. They are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff.

Jenkins, 409 So.2d at 1042-43. In awarding punitive damages, the focus is on the defendant's conduct, not on the conduct of the plaintiff or the extent of the injury to be compensated. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir.1986). While the purpose of compensatory damages is "to restore the injured party to the position it would have been [in] had the wrong not been committed," Laney v. Am. Equity Inv. Life Ins. Co., 243 F. Supp. 2d 1347, 1354 (M.D. Fla. 2003), the purpose of punitive damages "is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." Owens-Corning Fiberglas Corp. v. Ballard, 749 So.2d 483, 486 (Fla.1999). "Punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others." W.R. Grace & Co.-Conn. v. Waters, 638 So.2d 502, 503 (Fla.1994). The punitive damage inquiry, unlike that for compensatory damages, "focuses primarily on

the egregiousness of the defendant's conduct." Watson v. Shell Oil Co., 979 F.2d 1014, 1019 (5th Cir.1992).

Moreover, the United States Supreme Court has also recognized the distinct purposes of compensatory and punitive damages:

> The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (citations omitted). Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). Punitive damages "serve a broader function; they are aimed at deterrence and retribution." State Farm Mutual Auto. Ins.Co. v. Campbell, 538 U.S. 408, 416 (2003).

Entitlement to punitive damages, therefore, aimed at deterrence and retribution for a public wrong, is distinct and not dependent on the specific injury suffered by the class member. While no plaintiff in the Engle Class may ultimately receive an award of punitive damages without proving that he or she suffered actual damages in Phase III, the determination with regard to entitlement to punitive damages on a class basis need not be made concurrently with an evaluation of a particular claimant. See Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1217 (6th Cir.1988) ("[T]he district court need not defer its award of punitive damages prior to deter-

mining compensatory damages for the entire class of 128 individuals. So long as the court determines the defendant's liability and awards representative class members compensatory damages, the district court may in its discretion award punitive damages to the class as a whole at that time.") Moreover, although the Unites States Supreme Court has recognized that "compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker," it has never held that entitlement to these damages must absolutely be assessed at the same time. Cooper Indus., Inc., 532 U.S. at 432 (emphasis supplied). Therefore, in my view, the relative timing of the assessment of entitlement to punitive damages and a compensatory damage award is not critical. See Jenkins, 782 F.2d at 474. But see Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417-18 (5th Cir. 1998).

It is important to highlight the distinction between a jury determination that a class is entitled to punitive damages before compensatory damages have been actually awarded versus an actual jury award of a specific amount to a class as a lump sum punitive damage award before compensatory damages have been determined. In my view, the former comports with the requirements of due process while the latter, as the majority correctly concludes, does not. However, contrary to the conclusion reached by the majority, in my view, the trial court did not abuse its discretion in allowing the jury in Phase I of the trial plan to determine whether the class was entitled to punitive damages after liability regarding the common issues had been determined. Notwithstanding the above, I concur in the majority's holding which disapproves the trial court's trial plan in Phase II-B in which it allowed a lump sum punitive damage award to be determined prior to a determination of individual class members' compensatory damage awards, which will occur in Phase III, based on due process concerns. A simple determination of entitlement to punitive damages on a class basis does not violate Tobacco's

due process rights because no class member will be awarded punitive damages until the class member has been awarded compensatory damages in Phase III. See In re New Orleans Train Car Leakage Fire Litigation, 795 So.2d 364, 379 (La. Ct. App. 2001) (determining that there was no due process violation where the quantum of punitive damages was determined when the quantum of compensatory damages had been determined as to only 20 of 8,047 plaintiff class members). Ultimately, Tobacco will not be required to pay a class member punitive damages until that class member demonstrates his or her entitlement to compensatory damages in Phase III. Tobacco will have the opportunity to be heard at each Phase III trial with regard to why that individual plaintiff is not entitled to compensatory damages. To date, Tobacco has not been required to pay any class member a punitive damage award. Therefore, because Tobacco in Phase III will be heard with regard to each class member's compensatory damage claim before they are required to pay that class member any punitive damages, I conclude that Phases I and II-A of the trial court's trial plan did not violate Tobacco's due process rights, and that the jury's finding with regard to entitlement to punitive damages should stand. The majority today has inflicted serious harm to class actions which involve egregious behavior and has done so contrary to the clear law of Florida.

CONCLUSION

For the above reasons, I respectfully dissent from the portion of the majority opinion that reasons and holds that it was error for the trial court to allow the jury to make a determination of the entitlement of the class to punitive damages during Phase I of the trial. If the majority had properly analyzed and discussed the availability of the class action status here the contrary result on the punitive issue would have been obvious. I concur in the majority's decision in all other respects.

QUINCE, J., concurs.

WELLS, J., concurring in part and dissenting in part.

I concur with the following in the majority decision and opinion:

1. Approving the Third District Court of Appeal's reversal of the $145 billion class action punitive damages award.

2. Approving the Third District's reversal of the judgment on behalf of plaintiff Amodeo.

3. Holding that the Third District misapplied Young v. Miami Beach Improvement Co., 46 So.2d 26 (Fla.1950), to the extent that the Third District's decision would bar individual smokers' claims. I do not, though, join in the majority's opinion to the extent that it implies that there could be a proper class action for smokers' claims.

4. Holding that the trial court erred in allowing the jury to find entitlement to punitive damages in Phase I of the trial.

5. Holding that the class be decertified.

I dissent as to all other parts of the majority decision and opinion for the reasons that I will write about in this opinion. In sum, I would affirm the remainder of the Third District's extensive opinion, except that I would provide that any individual who can show that he or she relied on being a member of the class certified by the trial court in this case and based on that reliance did not bring an individual action would be allowed to file suit within one year of our decision becoming final.[15]

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[15] There is no record of how many, if any, unnamed individuals relied upon being members of the class and thus did not file an independent action. I conclude that the latest date that this class could have closed was November 21, 1996, so that individuals would have to have claims which were not barred on that date. To avoid barring any of those individuals who did in good faith rely upon being members of the class, I would order that the statute of limita-

ANALYSIS

Overview

The bottom line is that this was not properly a class action. The Third District's decision that this was not a proper class action is in accord with the overwhelming majority of courts from numerous jurisdictions. The Third Circuit in Barnes v. American Tobacco Co., 161 F.3d 127, 143 (3d Cir.1998), explains why:

> In decertifying the class, the District Court decided that "too many individual issues exist which prevent this case from proceeding as a class action." Barnes [v. American Tobacco Co.], 176 F.R.D. [479,] at 500. As noted, the District Court found that addiction, causation, and affirmative defenses all presented individual issues not properly decided in a class action. We believe that addiction, causation, the defenses of comparative and contributory negligence, the need for medical monitoring and the statute of limitations present too many individual issues to permit certification. As in Amchem [Products, Inc. v. Windsor, 521 U.S. 591 (1997)], plaintiffs were "exposed to different . . . products, for different amounts of time, in different ways, and over different periods." See Amchem, [521 U.S. at 624] (citation omitted). These disparate issues make class treatment inappropriate. [n.19]
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> [n. 19.] We note that the individual issues raised by cigarette litigation often preclude class

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tions can be avoided for those individuals or claims filed for one year from the date of our decision becoming final. An individual would have to plead and prove the avoidance as a reply to a statute of limitation affirmative defense pursuant to Florida Rule of Civil Procedure 1.100(a). I believe that this procedure would conform to what this Court allowed in Lance v. Wade, 457 So.2d 1008 (Fla.1984).

> certification. See, e.g., Castano v. The American Tobacco Co., 84 F.3d 734 (5th Cir.1996) (decertifying 23(b)(3) class because individual issues predominated); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90 (W.D. Mo. 1997) (denying certification under 23(b)(1), (2) & (3) because of the presence of individual issues); Ruiz v. The American Tobacco Co., 180 F.R.D. 194 (D. Puerto Rico 1998) (denying certification under 23(b)(2) and 23(b)(3) because "cigarette addiction" claims raised too many individual issues). Significantly, no federal appeals court has upheld the certification [of] a class of cigarette smokers or reversed a District Court's refusal to certify such a class. In some state cases, however, plaintiff smokers have succeeded in certification. See Richardson v. Phillip Morris, No. 96145050/CE212596[, 1998 WL 35164799] (Baltimore Cir. Ct. Jan. 28, 1998) (certifying class of Maryland smokers seeking compensatory and punitive damages); R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39 (Fla.App. 3 Dist. 1996), rev. denied, 682 So.2d 1100 (1996) (certification of state-wide class of tobacco smokers suing for damages caused by smoking).[16]

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir.1996), was the initial case which comprehensively examined whether a class action could be pursued in tobacco litigation. While Castano was a class action claiming a nationwide class and the present case was limited to a Florida class,

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[16] Barnes was decided, and thus this footnote was written, before the Maryland Court of Appeals (Maryland's court of last resort) held that the class action in the Maryland case cited was not proper and decertified the class in Philip Morris v. Angeletti, 358 Md. 689, 752 A.2d 200 (2000).

much of the analysis is applicable to the present case.[17] The Castano court stated:

> The Castano class suffers from many of the difficulties that the Georgine [v. Amchem Prods., 83 F.3d 610 (3d Cir.1996),] court found dispositive. The class members were exposed to nicotine through different products, for different amounts of time, and over different time periods. Each class member's knowledge about the effects of smoking differs, and each plaintiff began smoking for different reasons. Each of these factual differences impacts the application of legal rules such as causation, reliance, comparative fault, and other affirmative defenses.

Id. at 742-43 n.15. The United States Supreme Court's analysis in Amchem Products, Inc. v. Windsor, 521 U.S. 591, 624-25 (1997), instructs on the point in rejecting a settlement of an asbestos litigation class action. Other cases with similar holdings are: Philip Morris USA Inc. v. Hines, 883 So.2d 292 (Fla. 4th DCA 2003); Estate of Mahoney v. R.J. Reynolds Tobacco Co., 204 F.R.D. 150, 156 (S.D. Iowa 2001); Badillo v. American Tobacco Co., 202 F.R.D. 261, 264 (D. Nev. 2001); Guillory v. American Tobacco Co., No. 97 C 8641, 2001 WL 290603 at *20, *24, *27 (N.D. Ill. Mar.20, 2001); Aksamit v. Brown & Williamson Tobacco Corp., No. C.A. 6:97-3636-24, 2001 WL 1809378 at *24 (D.S.C. Dec.29, 2000); Thompson v. American Tobacco Co., 189 F.R.D. 544, 551 (D. Minn. 1999); Hansen v. American Tobacco Co., No. LR-C-96-881, 1999 WL 33659388, *2, 1999 U.S. Dist. LEXIS 11277 at *7 (E.D. Ark. July 21, 1999); Insolia v. Philip Morris Inc., 186 F.R.D. 535, 546 (W.D. Wis. 1998); Emig v. American Tobacco Co., 184 F.R.D. 379, 389 (D. Kan. 1998); Barreras Ruiz v. American Tobacco Co., 180

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[17] See Susan E. Kearns, Decertification of Statewide Tobacco Class Actions, 74 N.Y.U. L.Rev. 1336 (1999).

F.R.D. 194, 197 (D.P.R.1998); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 94 (W.D. Mo. 1997); In re Simon II, 407 F.3d 125 (2d Cir. 2005); Arch v. American Tobacco Co., Inc., 175 F.R.D. 469 (E.D. Pa. 1997).

I recognize that a problem exists in this case because of the interlocutory appeal to the Third District in which a different panel of the Third District approved a class action for a class composed of Florida smokers. But I also recognize that the 1996 decision by the Third District was made at a time when this case was only in the pleading stage. At the time of the 1996 decision, there was no trial plan with Phases I, II, and III. In fact, the three individuals who became the class representatives and who presented claims for compensatory damages, Farnan, Della Vecchia, and Amodeo, were added as class representatives after the Third District's 1996 decision. Though the trial court proceeded on the basis of the 1996 Third District decision, for the reasons stated by the Second District in Toledo v. Hillsborough County Hospital Authority, 747 So.2d 958 (Fla. 2d DCA 1999), the 1996 decision in the interlocutory appeal should not be given law-of-the-case effect: "Due to the trial court's broad authority to alter or amend orders determining class certification, the doctrine of law of the case 'applies only sparingly in class certification proceedings.' Fair Housing for Children Coalition, Inc. v. Pornchai Int'l, 890 F.2d 420, at 421 (9th Cir.1989) (unpublished disposition)." Toledo, 747 So.2d at 960. The present majority apparently agrees because the majority ultimately decertifies the class.

In what I conclude will be harmful and confusing precedent, the majority saves some of the jury findings in Phase I of the class action before decertifying the class. I do not join in doing that; rather, I would follow the overwhelming majority of courts and hold that this was not a proper class action. The result of the majority "retaining the jury's Phase I findings" is not, as the majority asserts, "pragmatic," majority op. at 1269; rather, it is problematic. Under the majority's

holding, the class closed a decade ago. Who are the individuals that are to get the use of these "findings"? How will a trial court make that determination? Does the individual only have to have an injury manifest prior to November 21, 1996, or does the individual have to have notice of the class action? Does the majority's holding mean that the statute of limitation has not run on any Florida resident's claim whose injury manifested prior to November 21, 1996? How long do individuals have to file such individual actions? How are these findings to be used in cases in which the findings are used? I assume that any individual cases filed on claims in which injuries manifested on November 22, 1996, or later do not get the benefit of these findings, so that there will be two classes of claimants. These are only a few of the issues which arise in application of the majority's holding.

Punitive Damages

As previously stated, I concur in the majority's holding that agrees with the Third District that the trial court erred in allowing the jury to consider entitlement to punitive damages during the Phase I trial. I do not concur, however, with the majority's opinion that an award of compensatory damages is not a prerequisite to a finding of entitlement to punitive damages and that an award of compensatory damages need not precede a determination of entitlement to punitive damages. I do not concur because the majority's opinion is in conflict with the Supreme Court's decisions in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

The Supreme Court has made it clear that punitive damages must be in ratio to compensatory damages. In fact, the majority quotes a passage from the Campbell decision which makes this clear. It necessarily follows, then, that there must be compensatory damages in order for punitive damages to be in ratio to compensatory damages. Thus, I conclude that

the majority decision here is in conflict with the Supreme Court decisions and is thereby erroneous.

Law-of-the-Case Class Certification

I have previously stated why the law-of-the-case doctrine should not apply to the Third District's 2003 review of this case, which followed the Phase I and Phase II jury trials and judgments. Florida Department of Transportation v. Juliano, 801 So.2d 101 (Fla. 2001), should not be applied in this class action. Moreover, since the majority ends up decertifying the class, I fail to understand the point of the majority's discussion of this issue. Majority op. at 1265-67.

The Third District in its 2003 opinion correctly explains why the law-of-the-case doctrine does not apply. Liggett Group, Inc. v. Engle, 853 So.2d 434, 443 n. 4 (Fla. 3d DCA 2003). Furthermore, as the majority states, "Of course, this Court is not bound by the Third District's law of the case." Majority op. at 1267.

In the present case, the trial plan was not decided by the trial court until after the 1996 interlocutory appeal. The defendants objected to the trial plan and moved to decertify the class. The trial court denied the motion, although it expressed reservations about the manageability of the case and predicted that the necessary individual hearings will place a serious demand upon Florida's judicial resources. The denial of the defendant's motion to decertify was then appealed to the Third District. The Third District dismissed the appeal for lack of jurisdiction but expressly stated that the defendants had a right to obtain review of the propriety of the order by plenary appeal from any adverse judgment. Engle, 853 So.2d at 443. But now the majority in this Court makes the trial plan unreviewable in the district court by applying the law of the case to the earlier certification. Certainly, the trial plan should have been reviewable by the district court as part of a review of the motion to decertify after the trial plan

was ordered.[18] It was the trial plan which demonstrated just how unworkable this class action was and why the class should have been decertified. It was the trial plan which resulted in the errors upon which the majority in this Court reverses the trial court's final judgment.

It was the trial plan which resulted in the Phase I jury deciding whether the defendants were negligent, breached warranties, were strictly liable, or were guilty of fraud and misrepresentation, but Phase II decided the claimant's comparative fault. Such a bifurcation of issues violates article I, section 22 of the Florida Constitution, just as the Fifth Circuit in Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996), found that such a bifurcation of issues violated the Seventh Amendment to the United States Constitution.

The Castano court explained why a bifurcation of the comparative negligence issue from the defendant's negligence issue with a trial by separate juries is a violation of the Seventh Amendment to the United States Constitution:

> Another factor weighing heavily in favor of individual trials is the risk that in order to make this

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[18] See William Dodds, Trial Plans Come to Class Action Arena, 226 N.Y. Law J. (Aug. 13, 2001) at 2:

> Faced with actions that seek to aggregate claims of increasingly broad and disparate groups of plaintiffs, many courts across the country now require that plaintiffs, and sometimes both parties, prepare detailed trial plans at the time of or in advance of class certification. For example, in In re Ford Motor Company Vehicle Paint Litigation, 182 F.R.D. 214, 224 (E.D. La. 1998), the district court required the plaintiff to submit a trial plan, saying it was constrained from "certifying a class now and worrying about how to try it later." Similarly, in Southwestern Refining Co., Inc. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000), the Texas Supreme Court declared that "it is improper to certify a class without knowing how the claims can and will likely be tried," requiring plaintiffs to submit trial plans prior to certification.

class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment. This class action is permeated with individual issues, such as proximate causation, comparative negligence, reliance, and compensatory damages. In order to manage so many individual issues, the district court proposed to empanel a class jury to adjudicate common issues. A second jury, or a number of "second" juries, will pass on the individual issues, either on a case-by-case basis or through group trials of individual plaintiffs.

The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues. [n. 30] Thus, Constitution allows bifurcation of issues that are so separable that the second jury will not be called upon to reconsider findings of fact by the first:

> [T]his Court has cautioned that separation of issues is not the usual course that should be followed, and that the issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice. This limitation on the use of bifurcation is a recognition of the fact that inherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact. The Supreme Court recognized this principle in Gasoline Products [Co., Inc. v. Champlin Refining Co., 283 U.S. 494 (1931)]. . . . The Court explained . . . that a partial new trial may not be "properly resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." Such a rule is dictated for the very

> practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent.

Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir.1978) (citations and footnotes omitted).

> [n. 30] "[N]o fact tried by jury, shall be otherwise re-examined in any Court of the United States . . ." U.S. Const. amend VII.

The Seventh Circuit recently addressed Seventh Amendment limitations to bifurcation. In [In re] Rhone-Poulenc [Rorer, Inc.], 51 F.3d [1293] at 1302-03, Chief Judge Posner described the constitutional limitation as one requiring a court to "carve at the joint" in such a way so that the same issue is not reexamined by different juries. "The right to a jury trial . . . is a right have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." Id. at 1303.

Severing a defendant's conduct from comparative negligence results in the type of risk that our court forbade in Blue Bird. Comparative negligence, by definition, requires a comparison between the defendant's and the plaintiff's conduct. Rhone-Poulenc, 51 F.3d at 1303 ("Comparative negligence entails, as the name implies, a comparison of the degree of negligence of plaintiff and defendant.") At a bare minimum, a second jury will rehear evidence of the defendant's conduct. There is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings

> of a first jury. The risk of such reevaluation is so great that class treatment can hardly be said to be superior to individual adjudication.

84 F.3d at 750-51. Every smoker's case has a substantial comparative fault defense.

The majority's opinion approves one jury making the decision on the defendant's negligence and a different jury making a decision on the plaintiff's negligence and comparing the two. The second jury will be required to accept the first jury's findings as to the defendant's negligence and then in some way compare the defendant's negligence with the second jury's finding as to the plaintiff's negligence. It is only logical that comparative negligence, which the second jury will be finding, is an evaluation of how the negligence of the two parties relate. That can only be accomplished by weighing the evidence of each party's negligence as a cause of the defendant's negligence, which the majority's bifurcation of negligence and comparative negligence prevents from occurring on the basis of one jury's findings. Similarly, there is no logical way to decide the issues of misrepresentation and the element within misrepresentation of reliance by separate juries without having the second jury required to accept the findings of the first jury. Both constitutionally and practically, these are issues which should be decided by one fact-finder so that there is consistency in the resolution of the facts.

The majority states that it will follow the Fifth Circuit's two-to-one majority opinion in Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 628-29 (5th Cir.1999), rather than the Fifth Circuit's decision in Castano. I cannot agree. Mullen was not a smoker's case. Mullen was a case brought under the federal Jones Act,[19] in which the claims by the individuals were from the same defective ventilation system in a floating casino that occurred over the same general period

[19] 46 U.S.C. § 688 (1988).

of time. The Mullen majority pointed out that these were important distinguishing facts from Castano and from the asbestos case decided by the Supreme Court in Amchem Products, Inc. Moreover—and very significantly—the Mullen majority specifically pointed out that as in Treasure Chest, the defendant in the Mullen case did not raise in the trial court the Seventh Amendment issue of having one jury consider the defendant's conduct and another consider the plaintiffs' comparative negligence. I find the dissent in Mullen, which adheres to Castano and In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302-03 (7th Cir.1995), to be the view which is correct for smokers' cases in Florida.

Finally, the majority opinion decides that the cut-off date for class membership should be November 21, 1996. Majority op. at 1274. This was, of course, after the Third District decision in the interlocutory appeal, which was issued on January 31, 1996. R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39 (Fla. 3d DCA 1996). It is wholly inconsistent for the majority to apply the law of the 1996 case to prevent the Third District's 2003 review of the certification and to also hold that the cut-off date for the class was after the 1996 review. This results in the actual order of certification being unreviewable in the district court.

Closing Arguments and Individual Judgments

I dissent from the majority's decision that the blatantly improper closing arguments do not require reversal. The Third District's decision concerning this offensive argument was precisely correct. There is no way to read the argument of plaintiff's counsel other than to conclude that it dwelled upon issues which are and should be per se reversible error because the arguments were intended to have jurors make their decisions on issues which had no relevancy or materiality in the case. These arguments were extreme in my view. I will not join in a decision which affirms judgments which in part are a result of such arguments.

It is because of the closing arguments that the judgments for compensatory damages on behalf of Farnan and Della Vecchia against the defendants other than Liggett and Brooke[20] must be reversed. Additionally, the individual verdicts cannot stand because the closing argument in Phase I was not only materially tainted by racial pandering and pleas for nullification but was also materially tainted by arguments which would have only been appropriate in seeking punitive damages. Since, as the majority has held, it was improper for the trial court to allow the Phase I jury to consider punitive damages, the arguments in support of punitive damages were improper and wrongfully prejudiced the defendants from receiving a fair trial in Phase I. This is still another reason why it is error for the majority to allow some of the Phase I jury findings to stand.

CONCLUSION

For the foregoing reasons, I concur with the majority's reversal of the $145 billion judgment; reversal of the judgment in behalf of Amodeo; holding that the Third District misapplied Young v. Miami Beach Improvement Co., 46 So.2d 26 (Fla.1950); and holding that the trial court erred in allowing the jury to find entitlement to punitive damages in Phase I of the trial. I dissent to all other parts of the majority decision and opinion.

BELL, J., concurs.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Third District – Case Nos. 3D00-3206, 3D00-3207, 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215, and 3D00-3400

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[20] The majority held that the Third District was correct that the judgments against Liggett and Brooke should be reversed on other grounds. I agree.

(Dade County)

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Frankel, Matthew L. Myers, and Michael Stroud, Washington, D.C. on behalf of Trial Lawyers for Public Justice and Public Citizen, the Campaign for Tobacco-Free Kids, and the American Cancer Society; Stephen P. Teret and Jon S. Vernick, Center for Law and the Public's Health, Johns Hopkins Bloomberg School of Public Health, Baltimore, Maryland, and John B. Ostrow, Miami, Florida on behalf of American Public Health Association, American Medical Association, American Academy of Pediatrics, American Heart Association, American Lung Association, American Legacy Foundation and Roswell Park Cancer Institute, Sylvester Comprehensive Cancer Center/University of Miami Hospital and Clinics and the Women's Cancer League of Greater Miami; Phillip Timothy Howard of Howard and Associates, P.A., Tallahassee, Florida, Douglas Blanke, Executive Director, William Mitchell College of Law, Saint Paul, Minnesota, Richard A. Daynard, Ph.D., Robert L. Kline and Christopher Banthin, Northeastern University School of Law, Boston, Massachusetts on behalf of Tobacco Control Legal Consortium and Tobacco Control Resource Center; Roy C. Young of Young Van Assenderp, Tallahassee, Florida, John H. Beisner, John F. Niblock and Jessica Davidson Miller of O'Melveny and Myers, LLP, Washington, D.C., and Robin S. Conrad, National Chamber Litigation Center, Inc., Washington, D.C., on behalf of the Chamber of Commerce of the United States; Rebecca O'Dell Townsend of Haas, Dutton, Blackburn, Lewis and Longley, P.L., Tampa, Florida, Daniel J. Popeo and David Price, Washington, D.C., on behalf of Washington Legal Foundation and National Association of Manufacturers,

for Amici Curiae

APPENDIX B

[Opinion of the District Court of Appeal of Florida, Third District (May 21, 2003)]

LIGGETT GROUP INCORPORATED; Brooke Group Limited; Philip Morris Incorporated; Council for Tobacco Research-USA, Incorporated; Tobacco Institute, Incorporated; Lorillard Tobacco Company; Lorillard, Incorporated; Brown & Williamson Tobacco Corporation; American Tobacco Company; and R.J. Reynolds Tobacco Company, Appellants,

v.

Howard A. ENGLE, M.D., et al., Appellees.

Nos. 3D00-3400, 3D00-3206 to 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215.

District Court of Appeal of Florida,

Third District.

May 21, 2003.

Rehearing and Rehearing En Banc Denied Sept. 22, 2003.

Steel Hector & Davis, and Alvin B. Davis; Clarke Silverglate Campbell Williams & Montgomery, and Mercer B. Clarke, and Kelly A. Luther; Kasowitz, Benson, Torres & Friedman, and Marc E. Kasowitz, Daniel R. Benson, and Aaron H. Marks (New York), for Appellants, Liggett Group Inc. and Brooke Group Holding, Inc.

Shook, Hardy & Bacon, and Norman A. Coll; Winston & Strawn, and Dan K. Webb, and Stuart Altschuler (Chicago, Illinois); Dechert Price & Rhoads, and Robert C. Heim, and Joseph Patrick Archie (Philadelphia, Pennsylvania), for Appellant, Philip Morris Incorporated.

Carlton Fields, and Benjamine Reid, and Wendy F. Lumish; Jones, Day, Reavis & Pogue, and James R. Johnson, and Diane G. Pulley (Atlanta, Georgia); Jones, Day, Reavis & Pogue, and Robert H. Klonoff, and Charles R.A. Morse (Washington, D.C.), for Appellant, R.J. Reynolds Tobacco Company.

Adorno & Yoss, and Anthony N. Upshaw; King & Spalding, and Gordon A. Smith, and Richard A. Schneider, and Barry Goheen, and Stephen B. Devereaux (Atlanta, Georgia), for Appellant, Brown & Williamson.

Greenberg Traurig, and Arthur J. England, Jr., and David L. Ross, and Elliot H. Scherker; Shook, Hardy & Bacon, and James T. Newsom (Kansas City, Missouri), for Appellants, Lorillard, Inc., and Lorillard Tobacco Company.

Debevoise & Plimpton, and Joseph P. Moodhe (New York), for Appellant, Counsel for the Council for Tobacco Research-U.S.A., Incorporated.

Renaldy J. Gutierrez, and Kathleen M. Sales; Covington & Burling, and James A. Goold (Washington, D.C.), for Appellant The Tobacco Institute, Incorporated.

Stanley M. Rosenblatt, and Susan Rosenblatt, for Appellees.

Before LEVY, GERSTEN, and GODERICH, JJ.

GERSTEN, J.

This is an appeal from a final judgment in a smokers' class action law suit seeking damages against cigarette companies and industry organizations for alleged smoking related injuries. The final judgment awarded $12.7 million in compensatory damages to three individual plaintiffs, and $145 billion in punitive damages to the entire class. We reverse with instructions that the class be decertified.

I. Overview

In May of 1994, six named individuals filed a class action complaint seeking damages for injuries allegedly caused

by smoking. All six alleged they were unable to stop smoking because they were addicted to nicotine and, as a result, developed medical problems ranging from cancer and heart disease to colds and sore throats. They sought over $100 billion in compensatory damages on theories of strict liability, negligence, breach of express warranty, breach of implied warranty, fraud, conspiracy to commit fraud, and intentional infliction of emotional distress. In addition, the plaintiffs sought over $100 billion in punitive damages on their claims for fraud, conspiracy, and emotional distress. The defendants are the major domestic cigarette companies and two industry organizations (hereafter collectively referred to as "defendants").[1]

The class of smokers and their survivors (hereafter collectively referred to as "plaintiffs") was certified in October of 1994 as a nationwide class action under Florida Rule of Civil Procedure 1.220(b)(3). The trial court defined the class as: "All United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine."

Thereafter in 1996, this Court reduced the class to include Florida smokers only. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. 3d DCA 1996). This Court did not approve any trial plan for the case, because no trial plan had been issued at that time.

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[1] The defendant cigarette companies are: Philip Morris Incorporated ("Philip Morris"); R.J. Reynolds Tobacco Company ("Reynolds"); Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company ("Brown & Williamson" or "B & W"); Lorillard Tobacco Company and Lorillard, Incorporated (collectively, "Lorillard"); and Liggett Group Incorporated and Brooke Group Holding Incorporated (collectively, "Liggett"). The defendant industry organizations are The Council for Tobacco Research-U.S.A., Incorporated ("CTR") and The Tobacco Institute, Incorporated ("TI").

In February of 1998, the trial court issued its first trial plan, which provided for the trial proceedings to be divided into three phases.[2] Phase 1 consisted of a year-long trial on liability and entitlement to punitive damages. The jury considered common issues relating exclusively to defendants' conduct and the general health effects of smoking. At the conclusion of Phase 1, the jury rendered a verdict for the class on all counts.

In Phase 2, the jury determined that the three individual class representatives were entitled to compensatory damages in varying amounts which were offset by their comparative fault. The total award was $12.7 million. Thereafter, the jury determined the lump-sum amount of punitive damages for the entire class to be $145 billion, without allocation of that amount to any class member.

The defendants filed several post-verdict motions, including motions for remittitur and class decertification. The trial court did not hold hearings on the post-verdict motions.

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[2] The trial court subsequently made changes in the plan, both before and during the trial. A major change in the plan concerned the method of assessing punitive damages. The original plan provided that in Phase 1, after trying certain "common issues," the jury would determine the potential entitlement of subclasses to punitive damages and then determine a "basis or ratio" for computing punitive damages individually for each class member within each subclass. In Phase 2, the jury would determine the individual liability and compensatory-damage claims of each named plaintiff, and then the punitive "basis or ratio" would be applied to each plaintiff's compensatory award (if any) to determine his or her punitive award. However, after the jury returned its Phase 1 verdict, and before the Phase 2 trial began, the court abandoned the "basis or ratio" method. Instead the court determined the jury would assess punitive damages as a lump sum with respect to the entire class. No allocation would be made of that amount to any of the named plaintiffs, nor to any particular class member. The defendants objected to the original and to subsequent versions of the plan.

Instead, in November of 2000, the trial court entered an "Omnibus Order on All Pending Motions" denying most of the defense motions, with two minor exceptions.[3] The Omnibus Order granted judgment in the plaintiffs' favor in all other respects, ordering immediate payment to the individual plaintiffs, and directing the defendants to immediately pay the $145 billion in punitive damages into the court registry for the benefit of the entire class. The trial court reserved jurisdiction to "conduct further proceedings pursuant to the mandate of the Third District Court of Appeal"-an apparent reference to the coming Phase 3 trials and this Court's 1996 ruling that individual hearings are required "on at least the issue of damages, if not other issues as well." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d at 41.

In Phase 3, which has not yet begun, new juries will decide the individual liability and compensatory damages claims for each class member (estimated to number at least 700,000). The trial court will then divide the $145 billion punitive damages award equally among the successful class members. Pursuant to the Omnibus Order, interest on the $145 billion punitive award began accruing immediately at $14.5 billion annually. The defendants now appeal the adverse Omnibus Order.

II. Class Decertification Required

Although the emotional appeal of the class representatives' claims is compelling, our job as appellate judges is not

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[3] In its Omnibus Order, the court granted judgment in the defendants' favor in two respects. First, it ruled that the claims of named plaintiff Mr. Amodeo were time-barred with respect to strict liability, negligence, breach of warranty, and intentional infliction of emotional distress. However, it ruled that Mr. Amodeo's fraud and conspiracy claims were not time barred. Second, the court granted judgment for the defendants on the plaintiffs' claim for equitable relief, pursuant to a prior dismissal of that claim.

to be swayed by emotion where to do so results in violating established legal principles. The law in the instant case clearly mandates that the trial court order certifying the class be reversed, with instructions that the class members may pursue their claims on an individualized basis.

Under Florida Rule of Civil Procedure 1.220(d)(1), a class-certification order may be altered or amended at any time before entry of a judgment on the merits. Class-certification orders necessarily precede substantial development of the issues and facts. For this reason, a court is required to reassess its class rulings as the case develops. *See Barnes v. American Tobacco Co.*, 161 F.3d 127, 140 (3d Cir.1998); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Product Liab. Litig.*, 55 F.3d 768, 792 n.14 (3d Cir.1995); Stott v. Haworth, 916 F.2d 134, 139 (4th Cir.1990); *Kuehner v. Heckler*, 778 F.2d 152, 163 (3d Cir.1985); *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir.1983). Thus, even after a certification order is entered, "the judge remains free to modify it in the light of subsequent developments in the litigation." *Forehand v. Florida State Hosp.*, 89 F.3d 1562, 1566 (11th Cir.1996).

In 1996, this Court affirmed as modified the trial court order certifying the class. *See R.J. Reynolds Tobacco Co., et al. v. Engle, et al.*, 672 So.2d 39 (Fla. 3d DCA 1996). At that time, we limited the case to a Florida-only class based upon our finding that a nationwide class would be unmanageable because it would comprise in excess of one million class members. See *R.J. Reynolds Tobacco Co., et al. v. Engle, et al.*, 672 So.2d at 41. This was the first smokers' case to be certified as a class action anywhere in the country. At the time of certification, no trial plan had been issued and the plaintiffs estimated the class size at approximately 300,000 people.

Two years after class certification, the trial court issued its first trial plan. As finally implemented, the plan provided that trial would be divided into three phases. In Phase 1,

which has been completed, the jury made a general finding that smoking causes some, but not all, of the diseases in issue and that cigarettes containing nicotine are addictive. The jury also made a general finding that the defendants had engaged in unspecified conduct that "rose to a level that would permit a potential award or entitlement to punitive damages."

In Phase 2, which has also been completed, the same jury found the three class representatives established liability and compensatory damages with respect to their individual claims. The jury then awarded a lump sum of $145 billion dollars in punitive damages to the entire class, without allocation to any class member.

The trial plan provides that Phase 3, which has not yet begun, will consist of a series of individual trials before new juries to determine whether the defendants are liable to the other class members, and the amount of any compensatory damages. The plaintiffs have now more than doubled their original estimate of class size from 300,000 to at least 700,000. After completion of the estimated 700,000 or more class member individual trials, the plan provides that the trial court will then equally divide the $145 billion dollar lump-sum punitive award among the successful class members.

The defendants objected to the trial plan and filed their first motion to decertify the class in 1998. The trial court denied the motion, although it expressed "reservations about the manageability of this case" and predicted that "the necessary individual hearings will place a serious demand upon Florida's judicial resources."

The denial of decertification was then appealed to this Court. This Court dismissed the appeal for lack of jurisdiction, but expressly stated that the defendants had a right to obtain review of "the propriety of the order by plenary appeal from any adverse final judgment."[4]

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[4] The plaintiffs' "law of the case" argument in response to the decertification issues raised in this appeal clearly lacks merit in light

In the years since initial affirmance of certification in 1996, virtually all courts that have addressed the issue have concluded that certification of smokers' cases is unworkable and improper. *See Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir.1998), *cert. denied*, 526 U.S. 1114, 119 S.Ct. 1760, 143 L.Ed.2d 791 (1999); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir.1996); *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150 (S.D. Iowa 2001); *Badillo v. American Tobacco Co.*, 202 F.R.D. 261 (D.Nev.2001); *Guillory v. American Tobacco Co.*, 2001 U.S. Dist. LEXIS 3353 (N.D.Ill. Mar. 19, 2001); *Aksamit v.*

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of this Court's March 6, 1998 order expressly stating: "Appellants/petitioners may however, review the propriety of the order [denying decertification] by plenary appeal from any adverse final judgment." The "law of the case" doctrine, in any event, has only limited application to class-certification decisions. Such decisions remain conditional and subject to reconsideration until the case is finally resolved. *See* Fla. R. Civ. P., Rule 1.220(d)(1) (class certification order may be altered or amended any time before entry of judgment on the merits); *see also, Toledo v. Hillsborough County Hosp. Auth.*, 747 So.2d 958, 960 (Fla. 2d DCA 1999)(rejecting "law of the case" challenge to trial court's decision to decertify, even though the appellate court had previously affirmed the initial class certification); *Hebert v. Monsanto Co.*, 682 F.2d 1111, 1132 (5th Cir.1982) (law of the case is inapplicable to Federal Rule 23); *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir.1976) (same). Even the trial court acknowledged that this Court's prior approval of class certification was "preliminar[y]," and this Court has specifically noted that "law of the case is inapplicable if there is even an arguable change in the substantive evidence presented." *Metro. Dade County v. Martino*, 710 So.2d 20, 22 (Fla. 3d DCA 1998); *see City of Miami v. Bell*, 606 So.2d 1183, 1185 (Fla. 1st DCA 1992)(the "law of the case" doctrine was "not meant to create vested rights in decisions that have become obsolete or erroneous with time"), *quashed in part*, 634 So.2d 163 (Fla.1994). The "law of the case" doctrine clearly does not foreclose decertification.

Brown & Williamson Tobacco Corp., 2000 U.S. Dist. LEXIS 18880 (D.S.C. Dec. 29, 2000); *Walls v. American Tobacco Co.*, 2000 U.S. Dist. LEXIS 16040 (N.D. Okla. Oct. 19, 2000); *Chamberlain v. American Tobacco Co.*, 70 F.Supp.2d 788 (N.D. Ohio 1999); *Hansen v. American Tobacco Co.*, 1999 U.S. Dist. LEXIS 11277 (E.D. Ark. July 21, 1999); *Thompson v. American Tobacco Co.*, 189 F.R.D. 544 (D.Minn.1999); *Clay v. American Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill.1999); *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 535 (W.D. Wis.1998); *Emig v. American Tobacco Co.*, 184 F.R.D. 379 (D. Kan.1998); *Barreras Ruiz v. American Tobacco Co.*, 180 F.R.D. 194 (D.P.R.1998); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo.1997); *Tijerina v. Philip Morris Inc.*, 1996 WL 885617 (N.D.Tex. Oct.8, 1996); *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 752 A.2d 200 (2000); *Reed v. Philip Morris, Inc.*, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997), *and on second motion*, No. 96-5070 (D.C. Super. Ct. July 23, 1999); *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 679 N.Y.S.2d 593 (1998), *aff'd*, 94 N.Y.2d 43, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999); *Geiger v. American Tobacco Co.*, 181 Misc.2d 875, 696 N.Y.S.2d 345 (N.Y. Sup. Ct. 1999), *aff'd*, 277 A.D.2d 420, 716 N.Y.S.2d 108 (N.Y. App. Div. 2000).

These class action decisions all applied rules that are functionally identical to Florida's class action rules.[5] In many instances these courts denied certification based upon the demonstrated problem in the instant case. Simply, that the plaintiffs smokers' claims are uniquely individualized and cannot satisfy the "predominance" and "superiority" re-

[5] We note further that since Florida's class action provision, Florida Rule of Civil Procedure 1.220, is based upon Federal Rule of Civil Procedure 23, federal precedents are persuasive authority in our construction of Florida's class action rules. *See Concerned Class Members v. Sailfish Point, Inc.*, 704 So.2d 200, 201 (Fla. 4th DCA 1998).

quirements imposed by Florida's class action rules.[6] See *Barnes v. American Tobacco Co.*, 161 F.3d at 149 (certification improper because smokers' claims involve "individual issues" such as "nicotine addiction, causation, . . . contributory/comparative negligence and the statute of limitations"); *Badillo v. American Tobacco Co.*, 202 F.R.D. at 263-65 (proposed class of persons exposed to second-hand smoke improper for certification because of individual issues of "causation, comparative fault, assumption of the risk, product identification, statute of limitations, and damages"); *Thompson v. American Tobacco Co.*, 189 F.R.D. at 551-52 (refusing to certify because individual issues predominated); *Emig v. American Tobacco Co.*, 184 F.R.D. at 387-95 (refusing to certify because smokers' claims are individualized); *Barreras Ruiz v. American Tobacco Co.*, 180 F.R.D. at 196-99 (refusing to certify for failure to satisfy requirements of commonality, representativeness, and fairness).[7]

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[6] Rule 1.220, sets forth the prerequisites for class certification and reads in pertinent part:

> "(a) Prerequisites to Class Representation. Before any claim . . . may be maintained on behalf of a class by one party or more suing . . . as the representative of all the members of a class, the court shall first conclude that (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim . . . of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim . . . of each member of the class, (3) the claim . . . of the representative party is typical of the claim . . . of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class."

[7] Moreover, this Court and other Florida courts have recognized the impropriety of class certification in cases comparable to this one. *See Norwegian Cruise Lines Ltd. v. Rose*, 784 So.2d 1248,

To be certified, a class must satisfy the prerequisites of Florida Rule of Civil Procedure, Rule 1.220. Rule 1.220(a) requires that common issues of law predominate over the different individual issues at the core of each class member's claim. *See Stone v. Compuserve Interactive Serv's, Inc.*, 804 So.2d 383 (Fla. 4th DCA 2001). This "predominance" or "commonality" requirement is not satisfied, where claims involve factual determinations unique to each plaintiff. See *Execu-Tech Bus. Sys. Inc. v. Appleton Papers, Inc.*, 743 So.2d 19 (Fla. 4th DCA 1999).

Rule 1.220 also requires that class representation be superior to other available methods of fairly and efficiently adjudicating the claims presented. *See Castano v. American Tobacco Co.*, 84 F.3d at 734; *Emig v. American Tobacco Co.*, 184 F.R.D. at 379; *Humana, Inc. v. Castillo*, 728 So.2d 261 (Fla. 2d DCA 1999). If significant individual issues ex-

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1248 (Fla. 3d DCA 2001) (reversing certification of class of cruise ship passengers who became ill by ship's food and water due to "insufficient commonality"); *Stone v. Compuserve Interactive Services, Inc.*, 804 So.2d 383 (Fla. 4th DCA 2001) (upholding denial of certification because of individualized fact issues and numerous differences in state laws governing different class members' claims); *Chateau Communities, Inc. v. Ludtke*, 783 So.2d 1227, 1231 (Fla. 5th DCA 2001)(reversing certification of mobile home owners class asserting fraud claims because a host of issues would have to be considered individually); see also *Hoechst Celanese Corp. v. Fry*, 753 So.2d 626, 628 (Fla. 5th DCA)(reversing certification of class of plumbing system owners asserting fraud claims because individual issues "not only predominate, but overwhelm, any common issues"), *rev. denied*, 773 So.2d 55 (Fla. 2000); *Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc.*, 743 So.2d 19 (Fla. 4th DCA 1999)(affirming refusal to certify class of fax paper purchasers alleging unfair trade practices since individual issues predominate); *Humana, Inc. v. Castillo*, 728 So.2d 261, 264 ("class actions seeking relief from separate contracts on the basis of fraud, whatever the genesis of the fraud, are prohibited"), *rev. dismissed*, 741 So.2d 1134 (Fla.1999).

ist, little value is gained by proceeding as a class action. Not only would the lawsuit become unmanageable, it would further be unjust to bind absent class members to a negative decision where the class representative's claims present different individual issues than those of the absent members. Under these circumstances, class representation would not be "superior" to individual suits for the fair and efficient adjudication of the controversy. *See* Fla. R. Civ. P. 1.220(b)(3).

Phase 2 of the trial conclusively established that individualized issues of liability, affirmative defenses, and damages, outweighed any "common issues" in this case, and that class representation is not superior. Specifically, concrete proof relating to the class representatives; Mr. Amodeo, Ms. Farnan, and Ms. Della Vecchia, established that individualized issues predominate and render further proceedings unmanageable.[8]

As evidenced by the proceedings in Phase 2, each claimant will have to prove that his or her illness not only was caused by smoking, but was also proximately caused by defendants' alleged misconduct.[9] For example, with respect to

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[8] After the year-long "common issues" trial in Phase 1, it took another five months to try the claims of just three individuals. Each of these three class representatives' cases required lengthy proof to establish the individualized elements of their claims. In Phase 3, each of the hundreds of thousands of others (at least 700,000 by the plaintiffs' estimate) will necessarily have to do the same.

[9] Phase 2 effectively demonstrated that specific medical causation is inherently individualized. For example, even though Ms. Farnan and Ms. Della Vecchia both developed "lung cancer," at least fourteen different experts were required to testify on that issue. With respect to Ms. Farnan, plaintiffs presented extensive testimony about her two independent primary cancers, her family history of cancer, her unique symptomology, and whether her lung cancer was really a BAC form of lung cancer (which the jury in Phase I had decided was not caused by smoking). With respect to Ms. Della Vecchia, there was extensive evidence about her treatment

any misrepresentation claim, each Phase 3 claimant will have to prove that he or she actually and reasonably relied on a false statement of material fact. This requires an individualized showing of reliance.[10] *See Shoma Dev. Corp. v. Vazquez*, 749 So.2d 1287, 1289 (Fla. 3d DCA 2000)(class action not appropriate for fraud claims; reliance of one purchaser does not establish that of others); *Castano v. American Tobacco Co.*, 84 F.3d at 745 ("fraud class action cannot be certified when individual reliance will be an issue"); *Clay v. American Tobacco Co.*, 188 F.R.D. at 492 (denying certification of claims alleging fraudulent marketing of cigarettes because "all members of the proposed class were not sub-

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regime, unique medical history, and whether she had a "scar cancer" which is a different type of cancer also not associated with smoking.

[10] There is no legal or factual support for the plaintiffs' "presumed reliance" argument. The plaintiffs suggest that class-wide liability can be created by presuming that every class member actually and reasonably relied on whatever unspecified statement(s) the jury found in Phase 1 to be false. The fatal flaw in this argument is that the plaintiffs never proved that every class member even saw or heard whatever statement(s) the Phase 1 verdict rests upon. Moreover, Florida law bars any presumption of reliance in cases involving fraud. *See Humana, Inc. v. Castillo*, 728 So.2d 261, 264-65 (Fla. 2d DCA 1999) (reliance requirement in common-law fraud cases cannot be satisfied by assumptions; class actions seeking relief from separate contracts on the basis of fraud are prohibited, irrespective of the genesis of the fraud); *but see Davis v. Powertel, Inc.*, 776 So.2d 971 (Fla. 1st DCA 2000) (damage claims brought pursuant to Florida Deceptive and Unfair Trade Practices Act are different from common law fraud claims because plaintiff need not demonstrate individual reliance on relevant representation or omission and, therefore, such claims may be asserted on behalf of a class), *review denied*, 794 So.2d 605 (Fla.2001).

jected to the same advertising and that advertising did not have a similar effect on all members.").[11]

Because each class member had unique and different experiences that will require the litigation of substantially separate issues, class representation is not "superior" *447 to individual suits. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir.2001); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643 (C.D. Cal.1996); see also *Barnes*, 161 F.3d at 145-46 (proof of general causation in cigarette litigation does not establish tort liability); *In re "Agent Orange" Product Liab. Litig.*, 818 F.2d 145, 164-65 (2d Cir.1987) (Main issue "is not whether [defendant's product] has the capacity to cause harm, the generic causation issue, but whether it did cause harm and to whom.").

This is further evidenced by the fact that affirmative defenses and damages must be litigated individually.[12] This

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[11] The Phase 2 trial also evidenced that individualized inquiries with regard to each smoker's awareness of the health risks of smoking at various points in time will be required in the Phase 3 trial. For example, Ms. Farnan testified that she was clearly aware of the health risks. In 1978, when she was 23, her father was diagnosed with a heart condition, and his doctor told Ms. Farnan that smoking had caused the condition. She later went to nursing school, where she received further information about the health effects of smoking. By the mid-1980's, she became "convinced" that smoking causes disease; nonetheless, she "absolutely wanted to continue smoking." In contrast, Mr. Amodeo testified that he believed that it had not been scientifically proven that smoking was addictive or caused lung cancer because he "didn't believe that the government would allow cigarettes to be sold if they were unsafe."

[12] The defendants raised a number of affirmative defenses to the plaintiffs' claims, including comparative fault, which common sense dictates requires individualized proof. However, the plaintiffs assert there is no need for individualized proof on these issues, essentially claiming that all class members were affected by the

Court has already recognized that damages require individualized proof. *See Engle*, 672 So.2d at 41. Particularly in this type of smoking case where proof of damages is essential to liability, damages cannot be determined on a class-wide basis because the issue of damages requires individualized proof with regard to each smoker.[13] *See Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc.*, 743 So.2d at 19 (class certification improper because "the issue of damages and impact in the case simply 'does not lend itself to [a mechanical calculation] but requires separate mini-trials, of an overwhelming[ly] large number of individual claims'"); *Smith v. Texaco*, 263 F.3d 394 (class members who "challenge[d] broad policies and practices that were applied in a non-standard way" could not assert uniform injuries and were required to prove punitive damages individually), *opinion withdrawn, cause dis-*

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defendants' allegedly wrongful and conspiratorial conduct in the same way.

This is simply not so as evidenced by the fact that the jury assessed different comparative fault percentages for each of the Phase 2 plaintiffs (Amodeo 25%, Farnan 20%, Della Vecchia 15%). The degree of fault the jury attributed to each defendant varied significantly among each of the three plaintiffs. Thus it is apparent that evaluation of each class members' comparative fault, will require experts on both sides to consider issues unique to each smoker, such as influences from friends and family members, exposure to information and/or propaganda regarding smoking, addiction issues, and actual knowledge of an injury or claim. It is impossible to determine such facts without mandating an individual inquiry into the specifics of each plaintiffs class members' circumstances.

[13] Proof of damages alone consumed several days of testimony with respect to each Phase 2 plaintiff. For example, on issues unique to Ms. Della Vecchia's alleged damages, the jury heard testimony from Ms. Della Vecchia herself, her husband, her two children, her sister, her brother-in-law, her family minister, and an economist. Comparable damages testimony will be required for each class member in Phase 3.

missed by, 281 F.3d 477 (5th Cir.2002); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 147 (4th Cir.2001) (impermissible to determine damages on a class-wide basis when the governing law requires individualized proof of damages; common issues may not predominate where proof of damages is essential to liability); *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977) (common issues did not predominate even though the case presented a common question of violation, because there existed individualized issues of injury and damage).

Similarly, individualized choice-of-law issues demonstrate that class proceedings in the instant case are unmanageable and cannot be viewed as superior to individual litigation. *See Stone v. Compuserve Interactive Serv., Inc.*, 804 So.2d at 383 (class certification improper where, among other things, individualized choice-of-law inquiries are required); *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir.2001) (certification improper because of "individualized issues and variances in state law"); *Castano v. American Tobacco Co.*, 84 F.3d at 741-44 (discussing how variations in state law can "swamp any common issues and defeat predominance").

For choice-of-law purposes, Florida law utilizes the "most significant relationship" test which provides that: "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties." *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999, 1001 (Fla.1980) (internal citation omitted); *see also, Ryder Truck Rental, Inc. v. Rosenberger*, 699 So.2d 713, 715 (Fla. 3d DCA 1997).

Applying Florida's "most significant relationship" test to the present case, the trial court was required to take into account a variety of factors beyond the place where the cause of action arose. During pretrial proceedings, undisputed evidence showed that nearly 50% of Florida residents who are

over 50 years old-those most likely to be class members-moved to Florida after reaching age 50. Moreover, more than 65% of all current and former smokers in Florida moved here after they became regular smokers. The demographic evidence presented at trial strongly suggested many class members were not Florida residents at the time of diagnosis or manifestation.[14]

If diagnosis or manifestation did not occur during residency in Florida, each court in the Phase 3 proceedings will have to perform a full choice-of-law analysis and apply the law of the state with the most significant relationship to the parties and the occurrence. Especially in a state which has a highly transient population, choice-of-law problems present an insuperable roadblock to smokers' class actions, even where the class is limited to one state's residents. *See Reed v. Philip Morris, Inc.*, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997) (memorandum opinion and order).

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[14] Additionally, the circumstances of particular named plaintiffs confirmed the likelihood of other states' laws applying to the plaintiffs' claims. For example, Mr. Starr, originally a named plaintiff, started smoking in Colorado, became a regular smoker in Colorado, and suffered his alleged smoking-related problems in Colorado. Mr. Starr's only connection with Florida was that he moved here a few months before suit was filed. Unlike Florida, Colorado requires that punishable conduct be proven beyond a reasonable doubt for purposes of assessing punitive damages. *See* Colo. Rev. Stat. Ann. § 13-25-127(2). The choice-of-law determination under such circumstances is obviously crucial.

Similar choice-of-law concerns are apparent with Mr. Amodeo and Ms. Della Vecchia. The Phase 2 trial revealed that Mr. Amodeo and Ms. Della Vecchia began and continued to smoke for much of their lives in Michigan and New York, respectively. Punitive damages are not available under Michigan law. *See Jackovich v. General Adjustment Bureau, Inc.*, 119 Mich. App. 221, 326 N.W.2d 458 (1982).

As noted in *Reed v. Philip Morris, Inc.*, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997) which denied class certification to plaintiff smokers where the choice-of-law analysis applied was the "most significant relationship" test:

> A class member may have started smoking, learned of the dangers of smoking, tried to quit, been diagnosed with a smoking-related illness, and/or changed brands, all in different states. Accordingly, this court would have to examine the laws of virtually every state, as it is conceivable, with the transient population of the District, that each of these issues may have arisen in different states with different class members, to determine if a conflict exists and then determine which state has the most significant interest. The potential for conflicts of law mitigates against certification.

See also Smith v. Brown & Williamson, 174 F.R.D. at 95 (rejecting smokers' class limited to one state's residents in part because of manageability problems in applying the "most significant relationship" test); *Tijerina v. Philip Morris Inc.*, 1996 WL 885617, at *5; *Philip Morris v. Angeletti*, 752 A.2d at 230-33 (rejecting smokers' class limited to Maryland residents in part because of manageability problems in applying simpler "lex loci delicti" test).

The choice-of-law analysis in the present case will require examination of numerous significantly different state laws governing the different plaintiffs' claims. This fact further supports our conclusion that common questions do not predominate over individual issues, and that the superiority and the management of this trial could not be fairly and efficiently conducted as a class action.

The plaintiffs' "negative value" argument in response to the above-cited and well-established line of authority does not justify improper class certification. The plaintiffs suggest certification must be maintained at any cost because other-

wise individual plaintiffs will be left with no viable remedy, absent class certification. According to the plaintiffs, individual plaintiffs could not successfully litigate against the tobacco industry because lawyers will shun smokers' individual cases as "cost prohibitive and impractical."

This factor by itself is insufficient to overcome the hurdles of predominance and superiority, and efficient and fair management of a trial, which are required by our class action rules. The serious problems this type of class action suffers in terms of both efficiency and fairness cannot be resolved by characterizing individual smokers' claims as having a "negative value." To do so is not only intellectually improper, but also clearly refuted by the Phase 2 verdict, where the jury awarded $12 million dollars in compensatory damages to just three smokers on their individual claims.[15] he plaintiffs' "negative value" claim is baseless and does not "justify the headlong plunge into an unmanageable and interminable litigation process that, at the outset, shows little promise for fairness to either [plaintiffs] or the defendant manufacturers." *Barreras Ruiz v. American Tobacco Co.*, 180 F.R.D. 194, 199 (D.P.R.1998); *accord Castano*, 84 F.3d at 748; *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 148 n.13 (3d Cir.2001).

In sum, particularly with regard to the determination of causation and damages, and where claims could require application of the laws of numerous other states, it is inescapable that the predominance and superiority requirements for class action have not been met. As succinctly stated by one commentator:

> [I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate.... Moreover, when individual rather

[15] Ironically, in support of a separate argument, the plaintiffs' brief boasts an award of $79.5 million dollars in punitive damages was entered in another case for "a single deceased smoker."

> than common issues predominate, the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified.

7a Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1778 at 535-39 (2d ed.1986) (footnotes omitted).

As now demonstrated by the two-year trial, even though there is a common nucleus of facts concerning the defendants' conduct, this case presents a multitude of individualized issues which make it particularly unsuitable for class treatment. *See State Farm Mut. Auto. Ins. Co. v. Kendrick*, 822 So.2d 516, 518 (Fla. 3d DCA 2002); *Humana, Inc. v. Castillo*, 728 So.2d 261, 265-66 (Fla. 2d DCA 1999); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir.2002) (reversing certification; differences in state law cannot be overridden based upon a quest to clear the queue in court); *Stirman v. Exxon Corp.*, 280 F.3d 554, 564 (5th Cir.2002) (reversing certification because district court failed to take into account significant variations in state law that defeat predominance). A class action is not superior to alternative means of adjudication, and the record does not support the requisite findings under Florida Rule of Civil Procedure, Rule 1.220.

The trial record and recent case law conclusively establish that Florida's class action rules, substantive tort law, and state and federal guarantees of due process and a fair trial, require class decertification. In accordance with the numerous cases which have found class certification improper in virtually identical smokers' claims cases, we find the class must be decertified. Accordingly, the certification of the class is reversed, with instructions to decertify and to allow all class members whose claims have not yet been tried to proceed individually.

III. Punitive Damages: "The Cart Before Horse"

The order below must also be reversed because the trial court erred in awarding and ordering payment of class-wide punitive damages without the necessary findings of liability and compensatory damages. The order violates well-established Florida precedent by: a) improperly requiring the defendants to pay punitive damages for theoretical injuries to hundreds of thousands of class members, without a determination that defendants are liable for such injuries; b) precluding the constitutionally required comparison of punitive damages and compensatory damages; and c) eliminating the jury's discretion to assess punitive damages based upon the individual class members' varying circumstances.

In Phase 1, the jury answered certain general questions about the defendants' products and conduct. The questions related to some, but not all of the elements of each legal theory alleged. The jury also found that unspecified conduct by the defendants "rose to a level that would permit a potential award or entitlement to punitive damages."

The jury did not determine whether defendants were liable to anyone. Essential elements of liability, such as reliance and proximate cause, were never tried in Phase 1. Instead, they were left to be tried separately for each class member in Phase 2 or Phase 3.[16] Yet, regardless of how many of the assumed 700,000 or more class members actually proceed to try their claims in Phase 3 and ultimately es-

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[16] The only determinations of liability that have been made so far in this case were made in Phase 2, and those determinations have been made with respect to only three individuals-Mr. Amodeo, Ms. Della Vecchia, and Ms. Farnan. Beyond these three individuals, the defendants have not been found liable to any class member on any legal theory, much less on any theory for which punitive damages are available in this case, *i.e.*, fraud, conspiracy to defraud, and emotional distress.

tablish liability and compensatory damages, the defendants must pay $145 billion dollars in punitive damages.

Florida law requires that a defendant be found liable before any punishment is imposed. Accordingly, "[w]here actual damage is an element of the underlying cause of action, an award of compensatory damages must be a prerequisite to an award of punitive damages." *Ault v. Lohr*, 538 So.2d 454, 457 (Fla.1989) (Ehrlich, C.J. concurring); *see also W.R. Grace & Co. v. Waters*, 638 So.2d 502 (Fla.1994) (punitive damages in bifurcated trial may not be determined until after the jury has determined liability for compensatory damages and the amount of compensatory damages); *Oliveira v. Ilion Taxi Aero Ltda*, 830 So.2d 241 (Fla. 4th DCA 2002) (punitive damages award reversed because there was no finding of liability). Federal due process law incorporates the same principle. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 418 (5th Cir.1998) (punitive damages "must be determined after proof of liability to individual plaintiffs"); *Taber Partners I v. Merit Builders, Inc.*, 121 F.3d 695 (1st Cir.1997) (unpublished table decision) (a "firmly established legal rule is that a finding of liability must precede any finding of damages").[17]

Without this prior assessment it is impossible to determine whether punitive damages bear a "reasonable" relationship to the actual harm inflicted on the plaintiff, as required by Florida and federal law. *See* § 768.74(5)(d), Fla. Stat. (1997); *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530, 533 (Fla.1985); *Langmead v. Admiral Cruises, Inc.*, 696

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[17] *See also Brian H. Barr, Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 28 Fla. St. U.L.Rev. 787, 824 (2001) (the Engle trial plan violated "both Florida law and the [defendants'] due process rights" by awarding "punitive damages to an entire class of injured Florida smokers prior to any findings of individual liability and individual harm for each class member").

So.2d 1189, 1193-94 (Fla. 3d DCA 1997)(under Florida and federal due process laws, a punitive award must be proportionate to the "actual harm inflicted on the plaintiff"); *see also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441-42, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (courts must examine "the ratio between the size of the award of punitive damages and the harm caused"); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (due process requires consideration of the "ratio" of punitive damages "to the actual harm inflicted on the plaintiff").

Establishment of this reasonable relationship requires a prior determination of the compensatory damages caused by the alleged misconduct. *See* Op. Att'y Gen. Fla., 2000 WL 329587 (Fla.A.G. 2000)("[i]n the absence of any determination of the extent of compensatory damages, the court lacks a standard by which it can judge whether an assessment of punitive damages is reasonable or is grossly excessive"). Without this prior determination, any comparison between a punitive award and the "actual harm" is impossible.

For this reason, federal and other state courts have repeatedly held that compensatory damages must be tried before punitive damages.[18] *See Southwestern Ref. Co. v.*

[18] For example, in *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), the Texas Supreme Court struck down a trial plan strikingly similar to the one presented here. The plan in Bernal provided that the jury would determine in Phase I whether defendants were grossly negligent; if it determined that they were, the jury would proceed in Phase II to assess an amount of punitive damages for the entire class. Individual trials would follow in Phase III. The intermediate appellate court largely endorsed the plan but held that the jury could not assess punitive damages without first making some findings of individual liability; it therefore modified the plan to require proof of compensatory damages by nineteen class representatives out of a putative class of 904 individuals before the assessment of class-wide punitive damages.

Bernal, 22 S.W.3d 425; *see also, Allison*, 151 F.3d at 418 (punitive damages in a multi-stage class action "must be determined after proof of liability to individual plaintiffs"); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 97 (W.D. Mo.1997) (rejecting a trial plan that required the jury to assess class-wide punitive damages before assessing compensatory damages); *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 752 A.2d 200, 247 (2000) ("Maryland law prohibit[s] an award of punitive damages made without regard to the actual compensatory damages to be awarded"); *cf. EEOC v. W & O, Inc.*, 213 F.3d 600, 615 (11th Cir. 2000) ("Before comparing the punitive damages to the actual damages, we must first determine what the 'actual damages' were").

In an apparent effort to sidestep this well-established authority, the plaintiffs argue *Ault v. Lohr*, 538 So.2d at 454, and *W.R. Grace & Co. v. Waters*, 638 So.2d at 502, have been complied with, contending that the Phase 1 verdict constitutes a finding that defendants "breached a duty." According to the plaintiffs, that finding alone is a sufficient predicate for a class-wide punitive award-even though it is not a finding of liability. The plaintiffs have misread Ault.

In *Ault*, the jury found the defendant was liable for civil assault and battery, not just that he had "breached a duty." The jury then awarded punitive damages without awarding compensatory damages. The Florida Supreme Court held that even in the absence of compensatory damages, the puni-

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The Texas Supreme Court reversed, finding that the modified trial plan was just as flawed as the original. It held that the modified trial plan improperly "allowed the jury [to] decide punitive damages for the entire class without knowing the severity of the offense or the extent of compensatory damages, if any, for each of the 885 plaintiffs." *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d at 433.

tive award was proper because it rested on the jury's "express finding of liability." *Ault v. Lohr*, 538 So.2d at 456.[19]

Plaintiffs' "breach of duty" theory ignores the essential finding of liability in *Ault*. A punitive award is proper only if the plaintiff proves every element of liability on the underlying cause of action. *See Ault v. Lohr*, 538 So.2d at 457 (Ehrlich, C.J., concurring).[20] See also, *Nat'l Aircraft Services, Inc. v. Aeroserv Int'l, Inc.*, 544 So.2d 1063, 1065 (Fla. 3d DCA 1989)(a fraud plaintiff who fails to obtain compensatory damages has not proved all the elements of fraud and thus may not obtain punitive damages).

Here, the plaintiffs sought punitive damages for fraud, concealment, and "intentional infliction of emotional dis-

[19] The plaintiffs in *Ault* were escaped inmates who, when recaptured, alleged a police dog was ordered to "bite and scratch them" while they were handcuffed. The plaintiffs sued for assault and battery, and one of them was awarded $0 in compensatory damages and $5000 in punitive damages. The Florida Supreme Court noted the general rule that "exemplary or punitive damages are not recoverable in an action of tort unless actual damages are shown." *Ault v. Lohr*, 538 So.2d at 455 (citations omitted). It then clarified its prior decision in *McLain v. Pensacola Coach Corp.*, 152 Fla. 876, 13 So.2d 221 (1943), and held that a jury finding of liability is the equivalent of finding nominal damages. Thus, a jury may assess punitive damages even if the amount of the actual damages is found to be $0. *Ault v. Lohr*, 538 So.2d at 456.

[20] The torts of assault and battery which were alleged in Ault do not require proof of actual injury or compensatory damages as elements of liability. *See, e.g., Paul v. Holbrook*, 696 So.2d 1311, 1312 (Fla. 5th DCA 1997) (battery); *Lay v. Kremer*, 411 So.2d 1347, 1349 (Fla. 1st DCA 1982) (assault); see also *Ault*, 538 So.2d at 457 (Ehrlich, C.J., concurring) (assault and battery "do not require proof of actual damage"). In other cases, however, where the alleged torts do require actual injury and compensatory damages, those (and all other) elements of liability must be established before punitive damages may be awarded. See *Ault*, 538 So.2d at 457 (Ehrlich, C.J., concurring).

tress." Liability for each of those causes of action requires much more than just a "breach of duty." Each requires actual injury, compensatory damages, and other liability elements as well.[21] Thus regardless of whether the Phase 1 verdict constituted a finding that defendants "breached a duty," such a finding is an insufficient predicate for the punitive award because it fails to establish actual injury and compensatory damages, plus other elements of liability, as to any of the individual class members.

The plaintiffs' alternatively argue Ault has been satisfied claiming the Phase 1 verdict actually did establish the defendants' "liability" to each class member. This argument is similarly meritless. The mere finding that smoking causes certain diseases does not establish the causation elements of liability.

Specific medical causation and legal causation, along with other elements of liability, must be established on an individualized basis. As noted by one court, "a finding of 'general causation' would do little to advance this [smokers class] litigation. Liability will not turn on whether cigarettes are generally capable of causing disease; liability will depend

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[21] For example, fraud and concealment require reliance, proximate causation, actual injury, and compensatory damages. *See, e.g., Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So.2d 13, 15 (Fla. 3d DCA 2002); *Jones v. Gen. Motors Corp.*, 24 F.Supp.2d 1335, 1339 (M.D.Fla.1998). Similarly, an "emotional distress" claim requires not only actual injury and compensatory damages, but also a showing of proximate causation and proof that the particular plaintiff suffered severe emotional distress. *See, e.g., De La Campa v. Grifols America, Inc.*, 819 So.2d 940, 943 (Fla. 3d DCA 2002); *Dominguez v. Equitable Life Assurance Soc'y*, 438 So.2d 58, 59 (Fla. 3d DCA 1983); *Stockett v. Tolin*, 791 F.Supp. 1536, 1556 (S.D. Fla.1992). Moreover, affirmative defenses must be adjudicated before liability can be established. *See Hospital Correspondence Corp. v. McRae*, 682 So.2d 1177 (Fla. 5th DCA 1996); *Kiser v. Jones*, 488 So.2d 554 (Fla. 3d DCA 1986).

upon whether cigarettes caused a particular plaintiff's disease." *See Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. at 96. No findings of specific medical and legal causation were made in the plaintiff-less Phase 1 trial.[22]

Finally, the plaintiffs attempt to satisfy Ault by claiming the Phase 2 verdict as to the three individual class representatives established the defendants' liability to all class members, and hence awarding punitive damages to the entire class is appropriate. This argument is also fundamentally flawed.

The defendants are entitled to a jury determination, on an individualized basis, as to whether and to what extent each particular class member is entitled to receive punitive damages. One class member's circumstances cannot serve as a proxy for another's.[23] *See, e.g., In re Copley Pharm., Inc.*,

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[22] *See supra*, page 445.

[23] This has been established during the Phase 2 trial of the individual plaintiffs. As discussed earlier, each of the three plaintiffs had uniquely different circumstances which directly impacted issues of liability and damages. This demonstrates their claims were inherently individualized.

Significantly, none of the three plaintiffs presented a proper claim within the class action. The jury expressly found that plaintiff Amodeo's claims were time-barred. According to the jury, Amodeo knew or should have known, more than four years before the suit was filed, that he was addicted to smoking and that his cancer could have been caused by smoking. Amodeo's knowledge thus barred his claims under the four-year statute of limitations. *See* § 95.11(3), Fla. Stat. (2001).

However, the trial court ruled that the statute did not bar Amodeo's fraud and conspiracy claims and barred only his other claims (strict liability, implied warranty, express warranty, negligence, and "emotional distress"), citing to *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So.2d 556 (Fla.2000). This was clearly error.

First, Amodeo's knowledge barred all of his claims equally, including his fraud claim and his derivative conspiracy claim. *See* § 95.031(2)(a), Fla. Stat.(2001)("an action for fraud . . . must be

begun within [the four year period] . . . running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence"); *Korman v. Iglesias*, 825 F.Supp. 1010, 1015 (S.D. Fla. 1993)(facts giving rise to a fraud claim are discovered when plaintiff has notice of facts different from what was allegedly represented).

Amodeo asserted that he had been defrauded into believing that cigarettes were safe and not addictive. According to the jury's verdict, however, he discovered the opposite more than four years before the present case was filed. His fraud and conspiracy claims were therefore time barred, just like his other claims.

Second, *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So.2d at 556 (Fla. 2000), does not establish an exception to the statute of limitations bar in the case of continuing fraud. The trial court's reliance on *Pulmosan* is misplaced. *Pulmosan* involved the statute of repose-the relevant provision here is the statute of limitations. Moreover, *Pulmosan* did not address fraud claims, and with respect to the different type of claims involved in *Pulmosan*, the Supreme Court merely held that it was unconstitutional for a statutory time bar to begin running until the injury was discovered. No similar issue was presented here, given the jury's finding that discovery took place more than four years before this suit was filed. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932 (Fla. 2000)(statute of limitations begins to run when plaintiff discovers a smoking-related injury), *cert. denied*, 533 U.S. 950, 121 S.Ct. 2593, 150 L.Ed.2d 751 (2001); *Korman*, 825 F.Supp. at 1015. The trial court erred in refusing to apply the jury's findings to Amodeo's fraud and conspiracy claims. Judgment should have been entered for the defendants as to all of Amodeo's claims.

Similarly, judgment should have been entered in favor of the defendants as to individual plaintiffs Farnan and Della Vecchia because their claims did not accrue until years after the cut-off date for class membership. Class membership is a prerequisite to participating in and receiving the benefits of a class action trial. *See Garrish v. United Auto., Aerospace & Agric. Workers of America*, 149 F.Supp.2d 326, 331 (E.D.Mich. 2001)(class membership must be defined to allow the court "to determine who would be entitled to relief, who would be bound by a judgment, and who is entitled

161 F.R.D. 456, 467 (D.Wyo.1995)(rejecting proposal to try punitive liability as a class-wide issue because punitive damages are measured, in part, by the outrageousness of the conduct relative to a particular plaintiff); *see also, Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 549 (D.N.J.2001)(denying class certification because, among other things, calculating compensatory and punitive damages would be an individualized task); *Adams v. Henderson*, 197 F.R.D. 162, 172 (D.Md.2000)(denying class certification due to, among other things, the fact that individualized damages inquiries would inevitably by required for the compensatory and punitive damages claims).

This Court specifically recognized in its 1996 mandate that "the issue of damages" in this case must "be tried as to each class member." *Engle*, 672 So.2d at 41. Our ruling made no distinction between compensatory and punitive damages.

The award below directly violates this Court's mandate because it allows the trial of three individuals' claims to establish entitlement to punitive damages with respect to the entire class. Our mandate was in accord with settled Florida law which provides that, "awarding punitive damages along

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to notice of the action"). The date of class certification sets the cut-off date for class membership. *See Davis v. Ball Mem'l Hosp. Ass'n*, 753 F.2d 1410, 1420 (7th Cir.1985)(referring to "the time the statewide class was certified" as the relevant cut-off); *Walker v. Haynes*, 659 F.2d 46, 47 (5th Cir.1981).

The class in this case was certified on October 31, 1994, and the order specifically referred to smokers "who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." By its terms, the class definition includes only those smokers who developed a disease by October 31, 1994. Since Farnan was diagnosed in April 1996, and Della Vecchia was diagnosed in February 1997, they are clearly excluded from the class and the judgment in their favor must be reversed.

with compensatory damages [is] discretionary [with the jury], even if the elements authorizing punitive damages [are] present." *Bankers Multiple Line Ins.*, 464 So.2d at 532; *see also, Owens-Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483, 486-87 (Fla.1999); *Wackenhut Corp. v. Canty*, 359 So.2d 430, 436 (Fla.1978); *Humana Health Ins. Co. v. Chipps*, 802 So.2d 492 (Fla. 4th DCA 2001); 1 *J. Kircher & C. Wiseman, Punitive Damages: Law & Practice* § 5: 23, at 5-152 (2d ed.2000) ("the jury, in its discretion, may withhold [punitive] damages in the face of overwhelming proof of the requisite egregious conduct on the part of the defendant").

Yet the plaintiffs suggest that it was proper for the trial court to "extrapolate" the class representatives' damages to the rest of the class during the punitive damages phase of the trial. Extrapolation is not theoretically permissible in this case because of the absence of essential information concerning actual class size, class composition, and the amounts of compensatory damages ultimately recoverable by class members.[24] Essentially, the compensatory damages awarded to the three Phase 2 plaintiffs proved nothing about the amounts of compensatory damages potentially recoverable by the hundreds of thousands of class members whose claims have not yet been tried. *See Smith v. Texaco*, 263 F.3d at 410 (where injuries are not uniform among class members, "an individualized inquiry is necessary" as to punitive damages);

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[24] Moreover, the three class representatives were hand-picked by plaintiffs' counsel and cannot be viewed as a statistically significant nor representative "sample." No statistical authority would condone an extrapolation of findings from three handpicked individuals to a population of 700,000. *See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir.1997)("the sample must be a randomly selected one of sufficient size so as to achieve statistical significance"); *In re Dow Corning Corp.* 211 B.R. 545, 572 n. 27 (Bankr.E.D.Mich.1997)(the sample "must be selected at random and must be representative of the group"); *Manual for Complex Litigation* § 33.27 (3d ed.1995).

Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319 (5th Cir.1998); *In re Fibreboard Corp.*, 893 F.2d 706, 710-12 (5th Cir.1990); *In re Tetracycline Cases*, 107 F.R.D. 719, 734-35 (W.D.Mo.1985).[25]

The plaintiffs' arguments in this regard contradict settled Florida law and basic concepts of due process. A claim for punitive damages is not a separate and distinct cause of action; rather it is auxiliary to, and dependent upon, the existence of an underlying claim. As such, any award of punitive damages can only be entered after awarding damages in conjunction with an underlying and successful claim for actual damages. *See State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)(punitive award must be limited to unlawful conduct that has a nexus to the "specific harm suffered by the plaintiff"; punitive award must be based upon facts and circum-

[25] In *Agency for Health Care Admin. v. Assoc. Indust. of Florida, Inc.*, 678 So.2d 1239 (Fla.1996), the Florida Supreme Court rejected the kind of irrebuttable presumption of uniform, aggregate liability suggested by the plaintiffs "extrapolation" theory as illogical and violative of the Florida Constitution. The case involved a statute that allowed the state to recoup Medicaid payments from the tobacco industry "on behalf of an entire class" of unidentified Medicaid recipients. The statute was found to be unconstitutional because it deprived tobacco companies of their rights under Florida law to defend against each claim. The statute effectively created an irrebuttable presumption that every Medicaid payment was proper and resulted from smoking. This was held improper.

Similarly, "extrapolation" in the present case creates an irrebuttable presumption that 700,000 or more unidentified individuals suffered injuries comparable to those suffered by the three class representatives. The presumption is irrebuttable because the $145 billion award will remain fixed, even if Phase 3 reveals that the vast majority of class members did not suffer such injuries. Such an irrebuttable presumption would clearly violate the law applied in *Agency for Health Care Administration*.

stances of the defendant's conduct and "the harm to the plaintiff"; courts must ensure punitive award is "proportionate to the amount of harm to the plaintiff").[26]

The trial plan in the instant case required the defendants to pay punitive damages for supposed injuries to thousands of class members without the necessary prerequisite findings of liability and compensatory damages. Since the class-wide punitive damages award improperly places the proverbial "cart before the horse," it must be reversed.

IV. Punitive Award Excessive Under State and Federal Law

It is well established that punitive damages may not be assessed in an amount which will financially destroy or bankrupt a defendant. *See Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So.2d 1039, 1043 (Fla.1982); *Lipsig v. Ramlawi*, 760 So.2d 170, 188 (Fla. 3d DCA 2000), *review denied*, 786 So.2d 579 (Fla.2001); *Brooks v. Rios*, 707 So.2d 374, 375 (Fla. 3d DCA 1998); *Hockensmith v. Waxler*, 524 So.2d 714, 715 (Fla. 2d DCA 1988).[27] And yet, that is precisely what occurred in the instant case.

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[26] In *State Farm*, the United States Supreme court reversed the Utah Supreme Court's decision upholding a punitive award of $145 million where the compensatory award was $1 million. The Supreme Court reiterated that punitive damages must be reasonable and proportionate to the harm suffered by the plaintiff. The Court cautioned: "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of [a] reprehensibility analysis." *State Farm*, 123 S.Ct. at 1516. In sum, punitive damages cannot be assessed in the aggregate. Punitive damages must be assessed on an individual basis, in relation to each class member's compensatory damages, if any.

[27] Federal due process also prohibits "excessive" punitive awards. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. at 424, 121 S.Ct. 1678; *BMW of North America, Inc. v. Gore*, 517 U.S. at 562, 116 S.Ct. 1589; *TXO Prod. Corp. v. Alliance Re-*

This trial produced the largest punitive damage verdict in American legal history. As acknowledged by even the plaintiffs' purported experts, the $145 billion punitive award will extract all value from the defendants and put them out of business, in violation of established Florida law that prohibits bankrupting punitive awards.

The defendants established that their combined net worth was no more than $8.3 billion.[28] Their collective capacity to

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sources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

[28] Florida courts routinely use net worth to determine whether a punitive award is bankrupting or excessive. *See Lipsig v. Ramlawi*, 760 So.2d at 189 (punitive award held improper because it was 1.12 times defendant's net worth and thus would result in defendant's "financial demise"); *Turner v. Fitzsimmons*, 673 So.2d 532, 536 (Fla. 1st DCA 1996)(net worth evidence critical to determination of excessiveness of punitive award); *Hockensmith v. Waxler*, 524 So.2d at 715 (net worth evidence used by the court to determine punitive award was excessive); *see also Brooks v. Rios*, 707 So.2d at 376 (evidence of net worth must be presented to preserve the defendant's right to argue excessiveness of award on appeal). Here, the defendants properly established their net worth and ability to pay through the testimony of each manufacturer's CEO and through the introduction of the defendants' audited financial statements. *See Rety v. Green*, 546 So.2d 410 (Fla. 3d DCA 1989)(president's testimony plus audited financial statements admissible as evidence of financial worth); *Salvage & Surplus, Inc. v. Weintraub*, 131 So.2d 515, 516 (Fla. 3d DCA 1961) (knowledgeable corporate officer can testify as to value); *see also Witchell v. Londono*, 707 So.2d 796, 799 n.2 (Fla. 1st DCA 1998)(corporate officer with knowledge of relevant values is qualified to testify); *Mercury Marine Div. of Brunswick Corp. v. Boat Town U.S.A., Inc.*, 444 So.2d 88, 90 (Fla. 4th DCA 1984)(corporate officer's testimony established loss of business value); *Alexander v. Alterman Transp. Lines, Inc.*, 387 So.2d 422, 424 (Fla. 1st DCA 1980)(financial statements provided sufficient evidence of financial worth upon which to base punitive award).

pay any punitive award while still remaining in business was far less. The $145 billion verdict is roughly 18 times the defendants' proven net worth.[29]

There is no precedential authority for such an award. No Florida decision endorses even a remotely comparable award. The largest reported awards involved only a fraction of a defendant's net worth. *See Wackenhut Corp. v. Canty*, 359 So.2d 430 (Fla.1978) (2%); *Bould v. Touchette*, 349 So.2d 1181 (Fla.1977) (6.2%); *Zambrano v. Devanesan*, 484 So.2d 603 (Fla. 4th DCA 1986) (14.29%); *Smith v. Telophase Nat'l*

Significantly, the plaintiffs' "experts" (who were neither CPA's nor accounting experts), never refuted the defendants' audited financial statements. Net worth and ability to pay can be determined only through the objective application of generally accepted accounting principles. *See, e.g., Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1200 n.3 (11th Cir.2001); *Southwest Whey, Inc. v. Nutrition 101, Inc.*, 188 F.Supp.2d 986, 989 (C.D.Ill.2002); *Wilson v. Gillis Adver. Co.*, 145 F.R.D. 578, 582 (N.D.Ala.1993). The defendants clearly met their burden of proving net worth and ability to pay through the objective evidence presented in the form of their audited financial statements.

[29] Similarly, each defendant-specific award is a multiple of that defendant's individual net worth, as proven at trial. The $73.96 billion dollar award against Philip Morris was roughly twelve times its net worth of $6.4 billion. The $17.59 billion dollar award against Brown & Williamson was roughly twenty times its net worth of $894 million. The $16.25 billion dollar award against Lorillard was roughly eighteen times its net worth of $921 million. The $790 million dollar award against Liggett was twenty-three times its net worth of $33.8 million.

Furthermore, the jury awarded $36.28 billion dollars against Reynolds, even though plaintiffs' "expert" admitted that Reynolds had a negative tangible net worth after the exclusion of good will, which is not a saleable asset. Reynolds also showed that its 1999 income from continuing operations nationwide was only $195 million. Even after assigning a zero net worth to Reynolds, defendants showed a combined net worth of no more than $8.3 billion.

Cremation Soc'y, Inc., 471 So.2d 163 (Fla. 2d DCA 1985) (20%); *see also People ex rel. Dep't of Transp. v. Grocers Wholesale Co.*, 214 Cal.App.3d 498, 262 Cal.Rptr. 689, 699-700 (1989) (noting that while 10% is the maximum for punitive damage awards, significantly lower percentages are generally the norm). No case has awarded punitive damages based upon multiples of net worth, as was done in the present case.

A defendant's financial capacity is a crucial factor in determining the appropriateness of a punitive damages award. The amount awarded should be large enough to provide retribution and deterrence, but cannot be so great as to result in bankruptcy.[30] Punitive damages are imposed to benefit society's interests. Because society has an interest in protecting future claimants' demands, the importance of the relationship between the amount of punitive damages and the ability of the defendant to pay the award cannot be ignored.

The excessive award in the present case will frustrate the societal interest in protecting all injured claimants' rights to at least recover compensatory damages for their smoking re-

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[30] Moreover. even if an award is not bankrupting, it must be reasonable and proportionate to the harm suffered and cannot be justified solely upon the wealth of the defendant. *See State Farm*, 123 S.Ct. at 1525 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."). As noted by the United States Supreme Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432, 114 S.Ct. 2331, 2341, 129 L.Ed.2d 336 (1994): "This Court has not hesitated to find proceedings violative of due process where a party has been deprived of a well-established common-law protection against arbitrary and inaccurate adjudication. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. Punitive damages pose an acute danger of arbitrary deprivation of property, since jury instructions typically leave the jury with wide discretion in choosing amounts and since evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses."

lated injuries. Smokers with viable compensable claims will have no remedy if the bankrupting punitive award in the instant case is upheld.

For the several reasons stated above, we find the trial court abused its discretion when it denied the defendants' motion for either a remittitur or a new trial. This unprecedented punitive damages award is excessive as a matter of law, and thus does not promote a valid societal interest. See *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)(punitive award of $145 million on a $1 million compensatory judgment held excessive; award exceeding single-digit ratio between punitive and compensatory damages presumptively violates due process.)[31] As discussed further below, the bankrupting punitive award resulted from inflamed juror passion and prejudice which blinded the jury from properly considering the purpose of the award in relation to the defendants' financial capacity.

V. Inflammatory Arguments Mandate Reversal

Plaintiffs' counsel's improper race-based appeals for nullification caused irreparable prejudice and require reversal. It is obvious that the "runaway" jury award was largely the result of numerous improper comments by plaintiffs' counsel directing the jury to disregard limitations on punitive damages. The trial was book-ended with prejudicial attorney

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[31] As explained recently by the United States Supreme Court, an excessive award of punitive damages does not further a legitimate state purpose and constitutes an arbitrary deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment. *See State Farm*, 123 S.Ct. at 1519-20. Stressing the importance of de novo appellate review to prevent excessive jury awards resulting from arbitrary passion or prejudice, the Court noted: "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm*, 123 S.Ct. at 1520-21 (citations omitted).

misconduct which incited the jury to disregard the law because the defendants are tobacco companies.[32]

This was accomplished in two stages. First, by inflaming the jury with racial pandering and pleas for nullification of the law to secure entitlement to punitive damages. And second, by removing responsibility from the jury for the size of the award, through arguing the award would be subject to appellate review and that it would not be paid out in a lump sum, but rather through a payout scheme.

Plaintiffs' counsel began making racially-charged arguments on the first day of trial. This was done before a jury where four of the six venire members were African-American. In opening statements during the Phase 1 trial, plaintiffs' counsel told the jury that the defendants "study races" and "divide the American consumer up into groups," including "white" and "black."[33] Plaintiffs' counsel then ex-

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[32] The United States Supreme Court has recently noted that the danger of a punitive award resulting in an arbitrary deprivation of property is heightened where a jury is presented with evidence of net worth or evidence that has little bearing as to the amount of punitive damages that should be awarded. *See State Farm*, 123 S.Ct. at 1519-20. The Court in *State Farm* cautioned that "[v]ague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning the appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm*, 123 S.Ct. at 1520 (citations omitted).

[33] Later counsel presented an expert who testified that defendants' advertising had "perpetuated" the "racial segregation" of America through the 1970's and 1980's. In cross-examining an historian called by the defense, plaintiffs' counsel suggested that the witness admired Vice President John Calhoun, a defender of slavery before the Civil War, because the witness's resume included studies of Calhoun. Plaintiffs' counsel used this as an excuse to make the following speech about slavery:

plicitly tied these racial references to appeals for jury nullification of the law during closing argument. He set the stage by telling the jury: "And let's tell the truth about the law, before we all get teary-eyed about the law. Historically, the law has been used as an instrument of oppression and exploitation." Plaintiffs' counsel then juxtaposed defendants' conduct with genocide and slavery.[34] Although the trial court

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> [Y]ou know, according to people like Calhoun, there were two sides to that story. I mean, one side was: let's abolish slavery, and let's give people their freedom. And the other side was espoused by an intellectual such as Calhoun: No, slavery is okay. It's good. We need it. It's good for the South, good for the economy. Correct? There were two sides to that issue, according to people like Calhoun.

Over objection, plaintiffs' counsel continued to refer to defenders of slavery and to the poll tax, Strom Thurmond, and similar irrelevancies. The court acknowledged the comments were improper and gave the jury the following patently ineffective "curative" instruction: "We've gone into the past as far as this subject is concerned, and there's a lot about the discussion that we've had up to this point that has no relevancy or materiality [to] the issues in the trial. We understand that. Some sensitive issues have been raised back in the 1800s that [have] nothing to do with this case. So we'll proceed with that concept in mind. Go ahead."

Plaintiffs' counsel continued to engage in the same misconduct immediately thereafter. Nevertheless, the court did nothing more than sustain defendants' further objection, out of the hearing of the jury.

[34] The record reflects the following exchange:

> [Plaintiffs' counsel] "You want to be fair, and you say: Right, there's two sides to every question. What's the other side to the holocaust? What is it?
>
> [Defense counsel]: Objection your honor.

sustained a defense objection, plaintiffs' counsel proceeded to tell the jury that, like slavery and the Holocaust, there was just one "side" to whether the defendants should continue to sell cigarettes:

> If you admit that you sell a product that causes cancer-I admit my product causes cancer-and if you also admit it's also addictive, get out of the business. That's the only moral, ethical, religious, decent judgment to make... If you sell a product which causes cancer and which is addictive, stop selling it. Stop selling it, because you know it's doing unbelievable harm to your fellow Americans.

The defendants' objection was overruled, allowing plaintiffs' counsel to conclude: "[The defendants say] [i]t's a legal product. It's a legal product. Legal don't make it right. Legal don't make it right."

For more than sixty years, federal statutes have protected the right to sell cigarettes, even though Congress has recognized that cigarettes are dangerous. Federal law preempts claims that selling cigarettes is tortious or otherwise improper. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001).[35] A defendant cannot be punished for lawful conduct. *See State Farm*, 123 S.Ct. at 1522.

> [Plaintiffs' counsel, ignoring the objection]: What is the other side to slavery?

[35] In *FDA v. Brown & Williamson*, 529 U.S. at 137, 120 S.Ct. 1291, the Supreme Court noted that Congress has foreclosed the removal of tobacco products from the market since at least 1938. Moreover, during the period from 1965 to 1992-a period in which "the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects"-Congress passed various statutes that "directly addressed the problem of tobacco and health," while continuing to uphold the legality of selling ciga-

Because the sale of cigarettes is subject to federal regulation, attempts to impose contradictory requirements or prohibitions under state law are subject to at least implied preemption. *See, e.g., Insolia*, 128 F.Supp.2d at 1225 ("allowing tort actions against cigarette manufacturers and sellers for the allegedly negligent act of continuing to make and sell cigarettes would interfere with Congress's policy in favor of keeping cigarettes on the market"); *see also, Geier v. American Honda Motor Co.*, 529 U.S. 861, 865, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (federal regulation of car manufacturers preempted state-law tort claims); *cf., Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 350, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001) (state-law claims based on alleged misrepresentations to a federal regulatory agency were preempted).

Yet counsel repeatedly urged the jury to fight what he called "unjust laws" citing the civil disobedience of Martin Luther King and Rosa Parks.[36] Counsel compared the defen-

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rettes. *FDA v. Brown & Williamson*, 529 U.S. at 137-38, 120 S.Ct. 1291. *See Lorillard v. Reilly*, 121 S.Ct. at 2426.

[36] The record reflects counsel stated: "Let's discuss the concept of legal in the context of America. I noticed in last week's newspaper Rosa Parks, who is 86 years old, got the Congressional Gold Medal because in 1955-[objection]-she refused."

The defendants interrupted with an objection, which the court sustained. However, a short time later plaintiffs' counsel resumed what he had started-an appeal to civil disobedience, by commenting: "We look back in history. The whole civil rights movement of the '60s was fighting against unjust laws. Dr. King was arrested in the '60s."

Although the court sustained defendants' objection at this point, counsel ignored the ruling and went on: "In this building, in this building, a temple to the law, they were-there were drinking fountains which said Whites Only. I tell my kid[ ] about that. He said: how did you put up with this, daddy?" Counsel then added: "The point I'm making is, the point I'm making, that some day, some

dants' reliance on the laws which provided it is lawful to market and sell cigarettes, to positions taken by defenders of slavery and of the holocaust. He compared the jurors task, to the fight against segregation, invoking Rosa Parks, Dr. King, and, as he put it, the whole civil rights movement of the 60's, as a fight against unjust laws. He then tied this period in the past directly to the defendants, by telling the jury to stand up to the defendants' lawful conduct in marketing and selling cigarettes.

Counsel continued: "Other people were arrested in the '60s because although this is a court of law, a court of-I remember as a kid walking into this building."

At the end of plaintiffs' first day of closing, defendants renewed their request for a mistrial, citing a variety of improper arguments including the statements quoted above. With reference to those statements, plaintiffs' counsel admitted that he had asked the jury to disregard the law, just as Dr. King and Rosa Parks had disregarded laws that were later "recognized as wrong":

> I submit that in a case where one of their strongest legal defenses is that: We make a legal product, it is a legal product, that it is perfectly acceptable for me to analogize about all the things in this country historically which have been legal but have been recognized as wrong in future years.

The court deferred ruling on defendants' mistrial motion but warned plaintiffs' counsel that he was proceeding at his own peril and that plaintiffs' counsel should consider "the possible [e]ffect it may have on any appellate court." The court told plaintiffs' counsel: "[What] you shouldn't do in

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day our kids and grandchildren are going to say . . . [h]ow did you let them get away with it? How did you let them get away with it?" Despite the court's ruling sustaining defendants' prior objection, counsel succeeded in completing his improper argument to the jury.

front of the jury is pander.... Shouldn't pander [to] the jury." Nonetheless, the court refused to grant a mistrial because of the length of the trial proceedings that had already occurred stating:

> We've been here 10, 11 months. In this one final argument day, which is the first day, there has been at least two, maybe even three motions for mistrials. It just seems to me that it would be foolish to put ourselves in that position because of whatever reason, whatever behavior, whatever was said, to lose this opportunity to get this case resolved. It's an unusual case.... And to throw it away at the last minute, after 10, 11 months, because of some comment made or something that's unforeseen that happens during closing argument, to me, is ludicrous. And I'm concerned. I really am. I don't think any of us really want it, even though motions have been made. I don't think we really want that to happen.

Florida courts uniformly condemn the type of pandering which occurred in this case as inflammatory and prejudicial. *See Murphy v. Int'l Robotic Systems, Inc.*, 766 So.2d 1010 (Fla.2000); *Johnnides v. Amoco Oil Co.*, 778 So.2d 443, 444-45 (Fla. 3d DCA 2001). Nullification arguments have absolutely no place in a trial and violate state and federal due process by exposing defendants to liability and punishment based upon lawful conduct. *Urbin v. State*, 714 So.2d 411, 420 (Fla.1998); *see also Harding v. State*, 736 So.2d 1230 (Fla. 2d DCA), *review denied*, 744 So.2d 454 (1999)(defense may not argue jury nullification); *United States v. Trujillo*, 714 F.2d 102, 106 (jury nullification argument would improperly encourage jurors to violate their oath and apply the law at their own caprice).

The prejudicial impact of the nullification arguments was further compounded by counsel's racially charged statements. These statements were made to a predominantly African-American jury panel and were clearly directed toward

persuading the jury to nullify the law.[37] As this Court has previously emphasized: "It is, of course, highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues into any part of our judicial system." *Perez v. State*,

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[37] That the prejudice was irreparable cannot be denied. After the Phase 1 closing arguments, the defendants discovered a book authored by plaintiffs' counsel in which he admits having used, almost verbatim, the same race-based nullification arguments in an earlier case (a murder trial in which he obtained an acquittal) and specifically emphasizes that such arguments are effective because they are incurably prejudicial. *Stanley Rosenblatt, Murder of Mercy: Euthanasia on Trial* (1992).

Plaintiffs' counsel, Mr. Rosenblatt, declares in his book that: "When the law conflicts with common sense, common decency and simple fairness and justice, it is the law that must yield." Although he concedes that attorneys cannot explicitly tell a jury to "ignore the law", Mr. Rosenblatt boasts of his ability to persuade juries "in a subtle way" to nullify the law: "The area I would need to spend the most time on [during trial] was my 'Piss on the Law' theme. Whenever I came close to being direct on that subject the State would object, and their objections would always be sustained. I had to figure a way to tell the jury in a subtle way that they should disregard the law."

The book describes Mr. Rosenblatt's tactics for obtaining jury nullification through racial pandering and references to unjust laws: "I assured [my client] that I would get out my words about Martin Luther King and the unjust laws he fought against. That guaranteed that the prosecutors would be on their feet in a flash, but the black juror, the black male alternative, and the white jurors would know exactly where I was coming from." A review of the comments made during the Phase 1 closing and those referred to in the book, reveals Mr. Rosenblatt followed the script he had previously laid out in his book, almost to the letter. Plaintiffs' counsel, Mr. Rosenblatt, was well aware that the nullification arguments and racial appeals he presented to the jury in this case would result in incurable prejudice.

689 So.2d 306, 307 (Fla. 3d DCA 1997) (reversal required where a prosecutor characterized defendants as engaging in conduct that was "divided along racial lines"); *see Wallace v. State*, 768 So.2d 1247, 1250-51 (Fla. 1st DCA 2000) ("Our system of justice cannot tolerate an attempt to exploit these feelings of racial prejudice to the extent that they may exist among those who serve on juries."); *F.J.W. Enterprises, Inc. v. Johnson*, 746 So.2d 1145, 1147 (Fla. 5th DCA 1999); *Terrazas v. State*, 696 So.2d 1309, 1310 (Fla. 2d DCA 1997); *Reynolds v. State*, 580 So.2d 254, 256 (Fla. 1st DCA 1991); see also Bird, 255 F.3d at 1150-51 (due process in a civil trial was violated by plaintiffs' reference in closing argument to "white racism in exploitation of Indians," where Indians sat on the jury); *see also Gen. Motors Acceptance Corp. v. Baymon*, 732 So.2d 262, 271-72 (Miss.1999) (plaintiffs' counsel played the race card by making inflammatory racial arguments to the jury, including assertions that defendant's conduct victimized primarily African-Americans and the poor).

An appeal to race so fundamentally damages the fairness of a trial, that even in the absence of an objection, a new trial is required in order to maintain the public trust in our system of justice. *See Murphy v. Int'l Robotic*, 766 So.2d at 1030; *see Robinson v. State*, 520 So.2d 1 (Fla.1988). Here, plaintiffs' counsel repeatedly violated this rule and thus a new trial would be required even if no objection had been made.

However, the fact remains that the defendants did object repeatedly, and, although the court sustained some of the objections, it could not unring the bell.[38] *See Williams v. State*, 715 So.2d 1152, 1153 (Fla. 3d DCA 1998)(reversal required even though objections to counsel's improper statements were sustained, because "[t]he die was cast-the damage was done"); *Muhammad v. Toys "R" Us, Inc.*, 668 So.2d 254, 258-59 (Fla. 1st DCA 1996)(collective import of counsel's

[38] The trial court itself recognized (during Phase 2) that even if an objection is sustained, "once it's out, it's out."

improper arguments required a new trial even though some objections were sustained); *Walt Disney World Co. v. Blalock*, 640 So.2d 1156, 1158 n.1 (Fla. 5th DCA 1994)("You can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good."); *see also O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir.1977) (noting cautionary instructions are effective only up to a certain point; judges must realize that after repeated exposure of a jury to prejudicial information, "cautionary instructions will have little, if any, effect in eliminating the prejudicial harm").

Similarly egregious, plaintiffs' counsel repeatedly made legally improper arguments to the jury regarding the payment of any award, and personally vouched to the jury that the defendants would not go bankrupt. The prejudice caused by these statements is significant. By suggesting a large award would not bankrupt the defendants and that payments could be made in installments, plaintiffs' counsel ensured there would be no realistic check on the jury entering a bankrupting award.

This is clearly improper. A defendant's ability to pay a punitive award is to be measured as of the time of trial. Net worth cannot be based upon speculation regarding the defendant's future ability to pay. *See Cash v. Beltmann North American Co.*, 900 F.2d 109, 111 n. 3 (7th Cir.1990) (proper measure is net worth at time of trial); *Zhadan v. Downtown L.A. Motor Distrib., Inc.*, 100 Cal.App.3d 821, 161 Cal.Rptr. 225, 236 (1979) (same); *Fopay v. Noveroske*, 31 Ill.App.3d 182, 334 N.E.2d 79, 94 (1975) (jury may not base punitive damages on prediction of defendant's future earnings); *Bienvenu v. Dudley*, 682 So.2d 281, 285 (La.Ct.App.1996) (only "current" financial condition is relevant in determining appropriateness of exemplary damages); *Welty v. Heggy*, 145 Wis.2d 828, 429 N.W.2d 546, 549 (1988) (usual measure of wealth is net worth at the date of trial); *see also Brooks*, 707 So.2d at 376 (affirming punitive award where defendant failed to present evidence sufficient to establish his net worth

at the time of trial as a basis for comparison); Bould, 349 So.2d at 1181 (reviewing punitive award in comparison with defendant's net worth at the time of trial).[39]

Yet, plaintiffs counsel repeatedly violated this rule by urging the jury to assume any award would be payable in installments over decades into the future. The improper comments started during opening statements in Phase 2, when plaintiffs' counsel made an improper speaking objection in the presence of the jury stating:

> "That can happen in this case. There can be a pay-out."

During direct examination of his own witness, plaintiffs' counsel asked how much the defendants could afford to pay without going out of business:

> "if they had the right to pay out the money over an extended period of time?"

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[39] The plaintiffs' attempt to distinguish the defendants' cited cases by stating, without elaboration, that *Brooks v. Rios*, 707 So.2d 374 (Fla. 3d DCA 1998), and *Bould v. Touchette*, 349 So.2d 1181 (Fla.1977), do not support the defendants' position. However, the defendants' answer brief quotes both opinions, and these opinions expressly identify the relevant benchmark as "net worth at the time of trial," not some indefinite time in the future. The plaintiffs further claim that *Welty v. Heggy*, 145 Wis.2d 828, 429 N.W.2d 546, 549 (1988), and *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 940-41 (D.C.1995), are distinguishable because in both cases the plaintiff had the burden of proving defendant's "wealth and ability to pay." This is a non sequitur. The proper definition of "ability to pay" does not vary depending on who has the burden of proof. Finally, plaintiffs suggest that *Bienvenu v. Dudley*, 682 So.2d 281, 285 (La.Ct.App.1996), conflicts with Florida law because it prohibited the jury's consideration of a defendant's "future worth or earning capacity 'unless reasonably certain.'" In fact, Florida law imposes this same requirement (*see, e.g., Wransky v. Dalfo*, 801 So.2d 239, 242 (Fla. 4th DCA 2001)), which the plaintiffs now seek to avoid.

And during cross-examination of defendant Liggett's CEO, plaintiffs' counsel asked:

> "You wouldn't go out of business if there was a payout arrangement?"

Continuing this theme through to closing argument, plaintiffs' counsel urged the jury to base its award on a $118 billion dollar "difference" between what the defendants supposedly offered to pay under a proposed (but never implemented) national settlement — "368 billion" over twenty-five years-and what the defendants did agree to pay in actual settlements with States — "250 billion" over twenty-five years. Settlements based upon twenty-five year payouts have no bearing on the defendants' current ability to pay.[40] Contrary to plaintiffs' counsels representations, the defendants were ordered to pay the $145 billion dollar award immediately into the court registry. Clearly the references to "payouts" were designed solely to mislead the jury and inflate the punitive award.

After numerous defense objections, the court held plaintiffs' counsel in contempt for continuing to make statements referencing extended payouts.[41] However, while acknowledging the impropriety of counsel's conduct, the court denied the defendants' request for a mistrial.[42]

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[40] The plaintiffs' argument that counsel's references to payouts was justified, is unavailing. The plaintiffs cite to criminal cases and statutes specifically allowing fines and restitution to be paid in installments. There are no similar provisions for the payment of punitive damages in a civil case. No case supports the assumption of a twenty-five year payout for the purposes of assessing punitive damages.

[41] Plaintiffs' counsel was fined $5,000 and warned that any subsequent reference to a payout would cost him $100,000.

[42] The court stated: "Now, the record does reflect I made a ruling [prohibiting plaintiffs' references to a payout]. And it will also reflect that I did admonish Mr. Rosenblatt not to do it again,

The misconduct continued, as plaintiffs' counsel referred to matters outside the evidence, made derogatory personal remarks about opposing counsel, and expressed his personal opinion to the jury. Plaintiffs' counsel maligned a defense attorney by name, calling the attorney's argument to the jury "a fraud." He expressed his personal opinions about the merits of the case stating the defendants' position made him grit his teeth and say to himself: "Can anyone buy this?"

Plaintiffs' counsel further repeatedly expressed his personal opinions about the defendants' witnesses, making such comments as: "I wanted to punch" one witness; that another witness "wouldn't know science if he fell on science"; that he was sure another witness "was ashamed to give this answer, but he gave it . . . under oath"; and that as to another witness, "I figured, well, this guy hasn't been prepped on the subject [by counsel], so maybe I'll get an honest answer". He told the jury the defendants' CEO witnesses lied to him under oath during their depositions, and that defendants had engaged in the "longest running con in the history of the world," and "our kids and grandchildren" will ask "how did you let them get away with it?"

This Court has expressly condemned all of the categories of misconduct plaintiffs' counsel engaged in here. *See, e.g., Johnnides*, 778 So.2d at 444 (attacks on integrity of counsel are both contemptible and condemnable); *Owens-Corning Fiberglas Corp. v. Crane*, 683 So.2d 552, 554-55 (Fla. 3d DCA 1996) (reversal required by derogatory comments concerning opposing counsel; "it is never acceptable for one at-

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and, unfortunately, he did; not only once, he did it several times. . . . I let it slide, and maybe I should not have. . . . But this being as unusual case as it is, I sort of took a back seat on some of these admonition issues and I didn't do anything definitive, and I really feel that maybe I should have, in retrospect." The trial court expressly recognized that plaintiffs' counsel inundated the jury with improper references to extended payments.

torney to effectively impugn the integrity or credibility of opposing counsel before the jury"); *Carnival Cruise Lines, Inc. v. Rosania*, 546 So.2d 736, 737 n. 1 (Fla. 3d DCA 1989) (new trial required because plaintiffs' counsel made disparaging remarks about the defendant).

We have also held that it is improper for counsel to express personal opinions about a case or comment on matters not in evidence. *See Cohen v. Pollack*, 674 So.2d 805, 806-07 (Fla. 3d DCA 1996) (an attorney's personal beliefs or feelings about the case are irrelevant and constitute reversible error); R. Regulating Fla. Bar 4-3.4(e) (a lawyer shall not allude to any matter "that will not be supported by admissible evidence"); *see generally Ruiz v. State*, 743 So.2d 1, 4 (Fla.1999) (the "role of counsel in closing argument is to assist the jury in analyzing [the] evidence, not to obscure the jury's view with personal opinion, emotion and non record evidence").[43]

Again, even though the court sustained objections to some of counsel's statements, as noted previously, the prejudicial effect was incurable.[44] *See Williams v. State*, 715

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[43] Hundreds of federal court cases are in accord. *See e.g. Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1151 (9th Cir.2001)(racial stereotyping will not be condoned in civil cases; reversing judgment in favor of plaintiff Indian owned company where plaintiff's counsel made inflammatory comments regarding Indians to a jury consisting entirely of Indian tribal members); *United States v. Doe*, 903 F.2d 16, 24-28 (D.C.Cir.1990) (reversing conviction where racially inflammatory remarks were made during summation); *Miller v. North Carolina*, 583 F.2d 701, 704, 706-08 (4th Cir.1978) (same).

[44] In the face of counsel's misconduct, the court's determination to proceed at any cost was an abdication of its most basic duty. "[U]nless trial judges are willing to grant mistrials or new trials based upon prejudicial conduct of counsel, there will be no elimination of such conduct." *Murphy v. Murphy*, 622 So.2d 99,

So.2d at 1153 ("The die was cast-the damage was done"); *Muhammad*, 668 So.2d at 258-59; *Walt Disney*, 640 So.2d at 1158 n. 1. *See, e.g., Maercks*, 549 So.2d at 200 ("[w]hether we consider only the remarks as to which the objections were overruled, or the closing argument as a whole, there must be a new trial."); *Del Monte Banana Co. v. Chacon*, 466 So.2d 1167, 1175 (Fla. 3d DCA 1985) (the "cumulative impact of plaintiff's counsel's complained-of actions at trial clearly mandates reversal").

Enforcement of the settled prohibitions against this type of prejudicial misconduct was especially important in the context of this massive class action against a highly unpopular industry. The cumulative and inherent inflammatory impact of these arguments and conduct is clearly reflected by the verdict. Plaintiffs' counsel succeeded in inflaming the jury's passions as evidenced by the astronomical, bankrupting award.[45] In sum, the improper comments of plaintiffs'

102(Fla. 2d DCA 1993). As this Court stated in Gomez v. State, 751 So.2d 630, 632-33 (Fla. 3d DCA 1999):

> There comes a point and time in the conduct of a trial that the trial judge should and must intervene in the egregious conduct, whether it has been challenged or not. It is the trial judge who is the central figure in the courtroom especially in the eyes of a jury. The jury looks to the trial judge as the only neutral, impartial, detached participant in the trial.

In my view, the trial court erred in deciding not to grant a mistrial simply because this was a lengthy trial.

[45] The defendants point out that this is not the first time plaintiffs' counsel, Mr. Rosenblatt, has engaged in the type of misconduct requiring reversal. In *Maercks v. Birchansky*, 549 So.2d 199 (Fla. 3d DCA 1989), this Court reversed a judgment in favor of the plaintiff based upon the improper arguments and conduct of her attorney, Mr. Rosenblatt. Similar to the present case, in Maercks, Mr. Rosenblatt improperly made derogatory comments about opposing counsel and "asserted his personal opinion as to the credibility of a

counsel further deprived the defendants of due process and a fair trial, thus additionally requiring reversal.

VI. Liggett: Proof of a "Runaway Jury"

The punitive award against defendant Liggett is not supported by the evidence and demonstrates the jury was irreparably prejudiced in entering the grossly excessive $145 billion dollar award. The Phase 1 verdict found all defendants liable, including defendant Liggett Group, Inc. and defendant Brooke Group Holding, Inc. (hereafter collectively referred to as "Liggett/Brooke"). However, in the first part of Phase 2, the jury allocated zero fault to Liggett with respect to the non-punitive counts. Liggett/Brooke's motion to set aside the verdict as inconsistent was denied, and it was held jointly and severally liable for 100% of the compensatory damages award to each of the three named plaintiffs.

Yet, there was no evidence Liggett/Brooke had any knowledge about the health effects of smoking prior to this time. Liggett/Brooke was the only company that did not ammoniate the cigarettes it sold. Liggett/Brooke did not participate in the 1950's industry strategy meetings, did not sign or endorse the Frank statement, and was not involved in the creation of the Tobacco Industry Research Committee. Significantly, none of the class representatives purchased or smoked Liggett/Brooke cigarettes.

The verdict as to Liggett/Brooke must be reversed. Not only was there manifestly insufficient evidence to support the judgments in favor of the three named plaintiffs,[46] there was

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witness, the justness of his client's cause and the perfidy of the defendant." Regardless of the fact that some objections to the improper remarks were sustained, we reversed for a new trial based upon Mr. Rosenblatt's impermissible conduct.

[46] It is aphoristic that a plaintiff cannot prevail on claims for negligence, breach of warranty or strict liability, unless the plaintiff establishes that the product which allegedly caused the plaintiff's injury was manufactured or sold by the defendant. *See Mahl v. Dade*

likewise no evidence to support any punitive award, let alone an award that will destroy Liggett/Brooke many times over.[47] The patent impropriety of the verdict against Liggett/Brooke demonstrates the prejudicial impact of the errors at trial which, combined with the improper conduct of counsel and the trial plan, compels reversal as to all the defendants.

Despite the fact that not one of the three plaintiffs ever used a Liggett/Brooke product, the jury was obviously swept along in lemming-like fashion to find all the defendants responsible because they participated in the tobacco industry. This is not the law. Mere participation in the tobacco industry does not destine a corporation to legal suicide upon the shores of bankruptcy.

Pipe and Plumbing Supply Co., Inc., 546 So.2d 740 (Fla. 3d DCA 1989). Here, it is undisputed that the Liggett defendants did not manufacture or sell any of the products that allegedly caused injury to the individual plaintiff representatives. It is also undisputed that the jury found the Liggett defendants zero percent at fault with respect to each of the named plaintiffs. The inconsistency in the verdict alone, fundamentally undermines the verdicts underlying basis and requires reversal. *See Garriga v. Guerra*, 753 So.2d 146 (Fla. 3d DCA 2000); *Chabad House-Lubavitch of Palm Beach Cty., Inc. v. Banks*, 602 So.2d 670 (Fla. 4th DCA 1992); *Wharfside Two, Ltd. v. W.W. Gay Mechanical Contractor, Inc.*, 523 So.2d 193 (Fla. 1st DCA 1988).

[47] The jury awarded $790 million dollars in punitive damages against the Liggett defendants. This amount is twenty-three times Liggett's net worth, almost twice Liggett's gross revenues, ten times Liggett's operating income, and ten times Liggett's current assets. There was no valid evidentiary or legal basis for the jury's Phase 1 and Phase 2 findings regarding Liggett. Thus the claims against the Liggett defendants clearly should not have proceeded to the punitive damages phase. Moreover, it is difficult to fathom how the evidence presented could possibly rise to the level of reprehensibility necessary to support punitive damages where most industry experts uniformly praised Liggett as a model for how a tobacco company should conduct itself.

Here, judgment was entered against Liggett/Brooke for medical claims for smoking cigarettes that Liggett/Brooke did not make. The only explanation for this clearly improper verdict against a company whose cigarettes none of these plaintiffs ever used, is that the integrity of the entire trial was compromised as a result of the trial errors and improper conduct of counsel.[48]

Clearly there is no basis for the claims against Liggett/Brooke. The jury "ran amuck." Since there is no distinction between the claims as to the other defendants, which were all tried together and which were all subject to the same arguments and techniques, the tainted jury verdict requires that the entire case be reversed.

VII. The Punitive Damage Claims Are Barred

The punitive award is precluded by the settlement agreements which resolved all claims asserted by the states, as well as the final judgment resolving the state of Florida's suit against the tobacco industry, which expressly included claims for punitive damages.

In *Florida v. American Tobacco Co.*, No. 95-1446 AH (Fla. 15th Jud.Cir.1995), the State of Florida sued the same defendants for fraud, conspiracy, and the sale of a defective

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[48] Significantly with regard to the general verdict against all the defendants, there were no specific findings as to any act by any defendant at any period of time. The trial plan enabled the plaintiffs to try fifty years of alleged misconduct that they never would have been able to introduce in an individual trial, which was untethered to any individual plaintiff. The plaintiffs incited juror prejudice against an unpopular industry and created a composite plaintiff who smoked every single brand of cigarettes, saw every single advertisement, read every single piece of paper that the tobacco industries ever created or distributed, and knew about every single allegedly fraudulent act. It was error to permit the plaintiffs to use the class procedural device in order to alter the substantive rights of the parties in their favor.

and "addictive" product, asserting punitive-damage and other claims. Florida's allegations of misconduct were the same as those in the present case.

Other states around the country brought similar suits against the tobacco industry. The states settled all of their cases in 1997 and 1998. Separate agreements covered Florida and three other states. Florida settled and released its claims in 1997, by entering into the Florida Settlement Agreement ("FSA"), which resolved with finality all of Florida's claims, "including those for punitive damages."

A multistate agreement (the Master Settlement Agreement or "MSA") covered the remaining forty-six states. Under these agreements, defendants are obligated to pay the states more than $200 billion dollars (subject to specified adjustments) over the first twenty-five years, and to pay the states billions more in perpetuity after that.

Based upon these agreements, the defendants moved to preclude any punitive award asserting all punitive damage claims against the tobacco industry had been settled in the lawsuit brought by the State of Florida. The trial court denied the motions. Since application of res judicata is a question of law, our standard of review on this issue is de novo. *See, e.g., In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 (11th Cir.2001) ("A court's application of res judicata presents questions of law reviewed de novo"), *cert. denied*, 534 U.S. 827, 122 S.Ct. 66, 151 L.Ed.2d 33 (2001).

In *Young v. Miami Beach Improvement Co.*, 46 So.2d 26 (Fla.1950), the Florida Supreme Court held that a judgment in a suit involving a municipal corporation which resolved "a matter of general interest to all its citizens" was binding upon all citizens even though they were not parties to the suit. The court reasoned that each citizen "is a real, although not a nominal, party to such judgment, and cannot relitigate any of the questions which were litigated in the original action." *Young v. Miami Beach Improvement Co.*, 46 So.2d at 30.

Thus, once a government agency resolves a matter of public rights or interests, the same matter cannot thereafter be relitigated by private parties.

Similarly, in *Castro v. Sun Bank of Bal Harbour, N.A.*, 370 So.2d 392 (Fla. 3d DCA 1979), this Court held that private parties were barred from re-litigating certain public-nuisance and zoning claims already settled by the state. The settlement was binding on private parties regardless of whether they were formal parties to the original action, because they were "citizens of the State of Florida and the City of Miami at the time of the litigation." The same rule applies here.

The claims for punitive damages in the *Florida v. American Tobacco Co.* case and in this action are based on the same alleged facts. The punitive-damage claims in both cases addressed the same alleged misconduct and the same public interest. The plaintiffs, as private parties, do not have a "right" to punitive damages; punitive damages are awarded solely as a matter of public rights or interests, in order to serve the public policy of punishment and deterrence. *See, e.g., Gordon v. State*, 585 So.2d 1033, 1035-36 (Fla. 3d DCA 1991) (punitive damages "serve as punishment for what amounts to a public wrong"; private plaintiffs have "no cognizable, protectable right to the recovery of punitive damages at all"), *aff'd*, 608 So.2d 800 (Fla.1992); *see also Chrysler Corp. v. Wolmer*, 499 So.2d 823 (Fla.1986)(punitive damages are imposed for egregious conduct that constitutes a public wrong); *Ingram v. Pettit*, 340 So.2d 922 (Fla.1976)(same). Accordingly, as a matter of law, Florida's settlement and release, and the res judicata effect of the resulting final judgment, preclude the plaintiffs' punitive-damage claims here.

Having improperly allowed the punitive damages claim to proceed, the trial court committed further reversible error by instructing the jury not to consider the FSA and MSA with regard to the issue of punishment and deterrence. By

the time the Phase 2 trial began, defendants had already paid over $14 billion dollars to the states, including $1.7 billion dollars to Florida. Enormous financial obligations were imposed by the settlements that resolved all of the states' claims, including claims for punitive damages. Additionally, the FSA and MSA impose sweeping deterrent measures on defendants' future conduct, which included prohibitions on advertising and other activities that could not be constitutionally imposed absent the defendants' agreement.[49]

However, over the defendants' objection, the court instructed the jury:

> I hereby instruct you that the Florida Settlement Agreement and the Master Settlement Agreement do not constitute punishment of or deterrence to these defendants. You may consider evidence as to the Florida Settlement Agreement and the Master Settlement Agreement solely on the basis of the defen-

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[49] For example, the MSA: (a) dissolves the Council for Tobacco Research and the Tobacco Institute; (b) prohibits the targeting of youths in cigarette advertising, promotion, or marketing; (c) bans virtually all outdoor and transit advertising of tobacco products, including billboards; (d) bans the production, distribution, or sale of tobacco brand name products such as caps, jackets, and bags; (e) prohibits any agreement to limit or suppress research on the health effects of tobacco; (f) prohibits the making of any material misrepresentation of fact regarding the health consequences of using any tobacco product; and (g) provides for publication on the internet of a vast number of documents produced in discovery in past and future cases against the tobacco industry. Pursuant to the MSA, the attorneys general have the authority to monitor defendants' compliance and to enforce the MSA in court. In the event of a continuing violation, an attorney general may seek monetary fines, civil contempt, or even criminal sanctions.

dants' financial resources and obligations and changed conduct.[50]

Punishment and deterrence are the only legitimate objectives for a punitive damages award. The FSA and MSA clearly qualify as evidence relevant to punishment and deterrence. The defendants were entitled to have the jury consider the FSA and MSA as potential mitigating factors in determining the need for further punishment and deterrence, especially with regard to claims for the same alleged misconduct. *See Owens-Corning Fiberglas Corp. v. Ballard*, 749 So.2d at 487; *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984); *St. Regis Paper Co. v. Watson*, 428 So.2d 243 (Fla.1983); *see also Humana Health Ins. Co. of Florida, Inc. v. Chipps*, 802 So.2d 492 (Fla. 4th DCA 2001)("jury should have been allowed to consider any [potentially mitigating] evidence"); *Bankers Multiple Line Ins.*, 464 So.2d at 533 (parties should be permitted to present all evidence relevant to damages issues); *Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So.2d 1283 (Fla. 1st DCA 1993)(same); Fla. Std. Jury Instr. (Civ.) PD1(b)(2).

Although a trial court generally has broad discretion in formulating jury instructions, a defendant is entitled to have the jury instructed "on the law applicable to the issues raised by the evidence." *Klipper v. Gov't Employees Ins. Co.*, 622

[50] Although the instruction allowed the jury to consider the FSA and MSA on the issue of "changed conduct," this language does not equate with directing the jury to consider the agreements as to the need for punishment and deterrence. The two sentences of the instruction would negate each other, if "changed conduct" were interpreted as equivalent to the need for "punishment" and "deterrence." Such an interpretation would invalidate the instruction as contradictory and confusing. *See, e.g., Jacobs v. Westgate*, 766 So.2d 1175 (Fla. 3d DCA 2000) (reversal required "where a jury might reasonably have been misled, regardless of whether it has actually been misled"); *Poole v. Lowell Dunn Co.*, 573 So.2d 51 (Fla. 3d DCA 1990)(same).

So.2d 1141, 1143 (Fla. 2d DCA 1993). The trial court erred in providing the jury with an instruction that removed a disputed issue from the jury's consideration. *See South Motor Co. of Dade County v. Accountable Constr. Co.*, 707 So.2d at 912.

This error effectively precluded the defendants from presenting crucial mitigation evidence in the form of the FSA and MSA to support the argument that they had already received heavy financial obligations and binding deterrent measures for precisely the same conduct. The resulting prejudice is clearly evidenced by the astronomically excessive punitive damages award, and further exemplifies why reversal is required.

VIII. Conclusion: Awarding the GNP of Several European Countries Is Error

In conclusion, the entire judgment must be reversed and the class decertified. The class fails the requirements of predominance and superiority. Any initially imagined savings of judicial resources and expense, have been dispelled by the ensuing litigation and the overwhelming procedural problems inherent in the certification of this type of smokers' litigation. Those class members whose claims have not yet been tried, should be allowed to proceed individually.

Class certification in mass tort actions such as this has been historically disfavored by courts throughout the nation. This hesitancy to certify complex mass tort actions is based upon the evolving recognition that the class action mechanism is generally not superior for these types of cases, and results in a higher than normal risk of infringing upon the rights of defendants.[51]

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[51] Class certification significantly increases the number of unmeritorious claims and dramatically affects the stakes for defendants. *See Agent Orange*, 818 F.2d at 165-66. Defendants are more likely to be found liable in class action litigation and the damage awards in such proceedings are significantly higher. *See Manual*

The present case presents a classic example of the inherent dangers that arise when a complex mass tort action is improperly certified. As discussed throughout this opinion, there are multiple sound legal bases why the result of this class action trial, including the punitive damages award, cannot be sustained.

The trial plan which produced the $145 billion dollar award, violates Florida law, violates this Court's 1996 certification decision, and is unconstitutional. The proceedings that produced the findings of entitlement and the $145 billion dollar award were irretrievably tainted by class counsel's misconduct, and the award is bankrupting under Florida law. The fate of an entire industry and of close to a million Florida residents, cannot rest upon such a fundamentally unfair proceeding. Our system of justice requires more. Accordingly, we reverse the judgment below with instructions to decertify the class.

Reversed and remanded with instructions to decertify the class.

For Complex Litigation § 33.26 n. 1056; *Kenneth S. Bordens and Irwin A. Horowitz, Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989). Aggregation of claims places insuperable pressure upon defendants to settle, rather than face the unacceptably high risk of an all-or-nothing verdict; settlements by defendants in these cases have been referred to as "judicial blackmail." *See Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L.Rev. 941 (1995); *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1293 (7th Cir.1995).

APPENDIX C

[Final Judgment and Amended Omnibus Order of the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida (November 7, 2000)]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA-22

HOWARD A. ENGLE, M.D., et al.,
Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY, et al.,
Defendants

_____/

AMENDED FINAL JUDGMENT AND AMENDED OMNIBUS ORDER

KAYE, Circuit J.

THIS CAUSE having come on to be heard on the Defendants' **"Motion At The Conclusion Of Phase II-B For A New Trial Or Remittitur, To Set Aside The Verdict, And For Entry Of Judgement In Accordance With Defendants' Motions For Directed Verdict, To Grant All Motions For Mistrial previously pending Or Denied, To**

Decertify The Class, and Alternative Motion For New Trial", and the Court having been fully advised pursuant to over 190 pages contained in the "Motion", and in addition, having read the 78 page memo in support for a New Trial and Or Remittitur, and in addition having read over the contents of 6 rather voluminous loose leaf volumes submitted by the defense, and several other equally voluminous loose leaf volumes submitted by the plaintiffs, and having reviewed the applicable Law as submitted by both sides, the Court feels it can rule on the issues without further argument, oral or otherwise.

THEREFORE, the Court issues the following: **Omnibus Order:**

To say the least, this has been a most unusual and precedent setting trial. It consumed over TWO YEARS of hard fought trial by batteries of lawyers, required over 150 witnesses, involved thousands of documents and exhibits, and generated over 57,000 pages of testimony. The issues were highly complex and often novel, straining the ingenuity of the attorneys and of the Court.

This Case was brought alleging eight separate counts — **1-Strict Liability, 2-Fraud and Misrepresentation, 3-Conspiracy to Misrepresent and Commit fraud, 4-Breach of Implied Warranty and Merchantability and Fitness, 5-Intentional Infliction of Emotional Distress, 6-Negligence, 7- Equitable Relief, and 8-Breach of Express Warranty.**

The defense filed motions for directed verdict as to each count and the Court will address each count separately. Many of defendants motions, although titled separately, make reference to the same material relating to an individual count, but combining references to separate plaintiffs. The ruling on the efficacy of each count will therefore apply to each plaintiff unless otherwise noted.

The defendants have filed 22 Motions for Directed Verdict, and more than 24 other motions dealing with the issues in this case all of which were deferred and need resolution.

First, it should be noted that the jury in both Phase I and II A found each of the defendants Guilty as to all counts with the exception of count 7 for Equitable relief which the court dismissed previously under the plaintiffs request for Medical Monitoring.

Second, because it may become important in resolving some of the motions, the following is a list of the manufacturer, and their products, each of the plaintiffs class representatives were alleged to have smoked over the years.

MARY FARNAN

1. RJ Reynolds ---------- Camels, Salem, Winston, Winston Lights
2. Philip Morris ---------- Marlboro
3. Brown and Williamson - Viceroy, Raleighs, Tareyton, Carlton, Pall Mall
4. Lorillard ---------- Kent
5. American Tobacco ------ Lucky Strike

FRANK AMODEO

1. RJ Reynolds ---------- Winston, Camels
2. Philip Morris ---------- Marlboro, Virginia Slims
3. Brown and Williamson - Viceroy
4. American Tobacco ------ Lucky Strike

ANGIE DELLA VECCHIA

1. RJ Reynolds ---------- Winston Lights

2. Philip Morris ----------Benson & Hedges, Marlboro, Cambridge Lights, Parliament
3. Brown and Williamson - Pall Mall, Tareyton
4. Lorillard----------Kent
5. American Tobacco ------Lucky Strike

MOTIONS FOR DIRECTED VERDICTS

As to Count I — Strict Liability —

There was more than sufficient evidence at trial to satisfy the legal requirements of this Count and to support the jury verdict that cigarettes manufactured and placed on the market by the defendants were defective in many ways including the fact that the cigarettes contained many carcinogens, nitrosamines, and other deleterious compounds such as carbon monoxide. That levels of nicotine were manipulated, sometime by utilization of ammonia to achieve a desired "free basing effect" of pure nicotine to the brain, and sometime by using a higher nicotine content tobacco called Y-1, and by other means such as manipulation of the levels of tar and nicotine. The evidence more than sufficiently proved that nicotine is an addictive substance which when combined with other deleterious properties, made the cigarette unreasonably dangerous. The evidence also showed some cigarettes were manufactured with the breathing air holes in the filter being too close to the lips so that they were covered by the smoker thereby increasing the amount of the deleterious effect of smoking the cigarette. There was also evidence at trial that some filters being test marketed utilize glass fibers that could produce disease and deleterious effects if inhaled by a smoker. In addition, there was adequate evidence that all three of the class members whose claims were tried in Phase II-A smoked one or more brands manufactured by one of more of the defendants.

The defendants have claimed that this count should have been dismissed as being barred by Section 402A of the restatement of Torts, comment (i). This Court is guided by Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D Kan. 1995) quoting Rogers v. R .J. Reynolds Tobacco Co. 557 N.E. 2nd 1045 (Ind.App. 2 Dist. 1990) which said:

> "The reference in comment (i) to tobacco . . . does not as a matter of law remove all claims of defective tobacco products from the operation of 402A...[footnote 8]; Failing to warn the consumer of certain properties, such as nicotine addiction, in conjunction with its harmful qualities, render the product unreasonably dangerous....Also, a design defect which renders the product more addictive than it could be or addictive when it need not be at all, may render the cigarette unreasonably dangerous in conjunction with its harmful qualities"

The Motion for Directed Verdict as to Count I Strict Liability ,is DENIED

As to Count II — Fraud and Misrepresentation —

Abundant evidence was adduced at trial to support the legal requirements of this Count and to support the jury verdict of the Count of Fraud and Misrepresentation. From the early years of advertising up until July of 1969, defendants engaged in concerted advertising campaigns extolling the virtues of smoking and making references to the lack of health risks and stressing the alleged benefits of smoking. References were made to Doctors smoking with no ill effects, to Radio and Television stars like Arthur Godfrey, and to sports figures, all of whom smoked and hawked the health benefits of tobacco or lack of health risks. All the while the defendants knew by their own research and the work of others, that cigarettes were carcinogenic and caused cancer and other deadly diseases. Defendants reneged on their promises con-

tained in the Frank Statement of 1954, and never revealed to the public the addictive nature of tobacco-a fact they all recognized but never admitted. Even after 1969, defendants continued campaigns of misinformation about the dangers of smoking and fostered the myth that there was a continuing controversy about causation in face of the over whelming contrary body of evidence worldwide. Not only was there misinformation supplied by defendants, there was concealment of known information which affected the health of the public at large. Despite a duty not to deceive, and a duty to disclose, the defendants failed to reveal information they knew was contrary to that which they disseminated - information that the defendants had developed through their own research. The concept of duty to disclose and duty not to deceive can be stated in no clearer terms than the words of the Court in Joiner v. McCullers, 28 So 2nd 823 (Fla 1947)

> "—the rule that fraud cannot be predicated of a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence, does not apply where a party in addition to non-disclosure uses any artifice to throw the other party off his guard and to lull him into a false security. The concealment becomes a fraud where it is effected by misleading and deceptive talk, acts of conduct, or is accompanied by misrepresentations, or where in addition to a party's silence there is any statement, or act on his part which tends affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes fraud."

These words are as good today as they were in 1947 and apply directly to the Fraud count and the Conspiracy count

below. The only conclusion that can be drawn from such activity is that the defendants intended that the public rely upon that which the defendants generated over extended periods of time and which the defendants knew were false. Having been exposed over the years to countless advertising exposures, it is reasonable, and the jury so found, that the plaintiffs relied upon the representations made by the defendants.

The Motion for Directed Verdict as to Count II Fraud and Misrepresentation is DENIED.

As to Count III Conspiracy to Misrepresent and Commit Fraud,—

The Court finds sufficient and more than adequate evidence to satisfy the legal requirements of this Count and to support the jury verdict that the defendants acted in concert to misinform and deceive. The Council For Tobacco Research and the Tobacco Institute were creatures of a joint effort by the defendants to either hide and/or conceal scientific research, or provide disingenuous and misleading information to the public at large .Evidence was established that these entities were not only funded and supported by the defendants, but were in some cases controlled and manipulated by them. The establishment of the "Special Products" division to allow corporate counsel to be involved and thereby invoke the protection of the "attorney-client" privilege all the while claiming these entities were independent of the defendants, is a prime example of the collusion involved . In addition thereto, representatives met from time to time at conferences and retreats to discuss and share information about the health effects and addictive nature of smoking and reached certain agreements on how to deal with the scientific community, including the Surgeon Generals, and how best to continue the perceived controversy in the public's eye.

The Motion for Directed Verdict as to Count III Conspiracy to Misrepresent and Commit Fraud, is DENIED.

As to Count IV — Breach of Implied Warranty of Merchantability and Fitness—

The record reflects sufficient evidence to support the legal requirements of this Count and the jury verdict that each of the three class representatives whose claims went to trial, adequately met the requirement to sustain the count of Implied warranty. The testimony revealed that each smoked and were exposed to the various brands manufactured by the defendants not only by the act of purchasing the products from retailers but also through the promotional activities of the defendants. Specific reference was made in the evidence to the mailin coupon program whereby the defendants, by direct mail, supplied the plaintiffs with the various brands which they smoked These coupons where found in packs of cigarettes purchased by the plaintiff and were not available without a purchase-therefore were not "free". Other promotions offered merchandise that was available for redemption with purchased cigarette coupons. Still other promotions distributed free samples without a purchase directly from the manufacturer. The defendants rely upon the holding of Kramer v. Piper Aircraft Corp., 520 So 2nd 37 (Fla. 1988) and Westinghouse Corp.,V Ruiz., 537 So 2nd 596 (Fla. 3rd DCA 1988) which stands for the proposition that a no-privity breach of implied warranty, is supplanted by the doctrine of strict liability. However, in this case the Court specifically finds that the evidence, as referred to above, clearly establishes the requirement of "privity" necessary to sustain a claim for implied warranty. See, i.e. *Sheppard v. Revlon, Inc.*, 267 So 2nd 662 (Fla. 3rd DCA 1972)

The motion for Directed Verdict as to Count IV Breach of Implied Warranty of Merchantability and Fitness, in so far as it is related to privity, is DENIED.

As to Count V — Intentional infliction of Emotional Distress —,

The evidence in this case supports the legal requirements of this Count and the jury verdict that the plaintiffs not only suffered severe injuries caused by smoking cigarettes but, also suffered extreme mental anguish and disability from the emotional distress directly attributable to the physical injury. In addition thereto the plaintiffs also suffered emotional distress upon the realization of being addicted to the defendants product, a condition that doesn't necessarily manifest itself in any physical injury. Florida Courts have recognized the principle that there can be emotional distress with or without physical injury or impact. (Metropolitan Life Ins. Co. v. McCarson 467 So nd 277 Fla.1985) and (Eastern Airlines, Inc. v. King. 557 So 2nd 547 Fla. 1990). Survivors are also entitled to, and so the jury found, a claim for Infliction of Emotional Distress.

The Motion for Directed Verdict as to Count V- Intentional Infliction of Emotional Distress is, Denied.

As to Count 6 — Negligence —

The verdict of the jury on the issue of Negligence is well supported by the evidence. The elements of negligence have certainly been sufficiently proven by the testimony in this case in that any reasonable person or entity, armed with the information the defendants had, should have done that which a reasonable person would have done under like circumstances, or should not have done what a reasonable person would not do under like circumstances.. It is obvious that a reasonable person or entity would not have allowed a condition to exist that he or it knew would injure someone, without taking appropriate measures to prevent it. The defendants according to the testimony, well knew from their own research, that cigarettes were harmful to health and were carcinogenic and addictive. By allowing the sale and distribu-

tion of said product under those circumstances without taking reasonable measures to prevent injury, constitutes, in this Courts opinion, and in the opinion of the jury as it turns out,- negligence.

The Motion for Directed Verdict as to Count VI Negligence,, is DENIED.

As to Count VII — Equitable Relief —

This Count has previously been dismissed by the Court under the heading of Medical Monitoring.

The Motion for Directed Verdict as to Count VII- Equitable Relief, is GRANTED

As to Count VIII — Breach of Express Warranty —

Evidence adduced at trial more than adequately supports the jury verdict and satisfied the legal requirements of express warranty in that the defendant tobacco companies for decades prior to July 1969, advertised their products as being safe, free of medical risks, etc, by using such techniques as having "doctors" promoting the products, etc. In some instances making claims that a particular brand is easier and smoother on the throat and less irritating. Subsequent to 1969, the advertising campaign shifted to claims of low tar and nicotine when in truth the defendants knew the tar and nicotine levels were either false or manipulated.

The Motion for Directed Verdict as to Count VIII- Express Warranty, is DENIED.

In addition to the above, the defendants have filed numerous other motions for Directed Verdicts, which the Court will treat below:

Statute of Repose —

This issue as it relates to the facts of the case, has been resolved up to now by the decision in Pulmosan Safety Equipment Corp. v. Earl Barnes, 25 FLW S12 (case No.

SC94544 Opinion filed January 6th, 2000). The Supreme Court reaffirmed the decision in Diamond v. E.R. Squibb & Sons, Inc. 366 So 2nd 1221 (Fla 3rd DCA 1979) and held that there is an exception to the Statute of Repose in cases of latent injury in product liability cases.

> "Therefore, we hold that in a products liability action where the now-defunct statute of repose is still applicable, the latent injury exception remains viable so that the statute of repose will not extinguish the plaintiff's cause of action if his or her injuries are latent and undiscoverable within the repose period."

This concept has been following by the 2nd District in a recent opinion, Laschke v Brown and Williamson Tobacco Corporation et. al. 2000 WL 868251 (FLA.App. 2nd Dist.) in which the Court said:

> "The conspiracy of the defendants has been ongoing since at least December of 1953 and has been continuous through the present. We conclude that, because of the dispute surrounding these allegations, the date of the last act done in furtherance of the conspiracy presents a question of fact not proper for resolution on summary judgement. Therefore, the Laschkes' claim for conspiracy to commit fraud cannot be said to be barred by the statute of repose as a matter of law on this record."

The Motion for Directed Verdict on the issue of the Statute of Repose, is DENIED.

Statute of Limitations re: Frank Amodeo

The jury in Phase 11A determined that plaintiff Frank Amodeo knew or should have known on or before May 5, 1990 (4 years prior to the filing of this case) that he was addicted to smoking, and further, that he had cancer reasonably caused by smoking. This finding acts as a bar to Frank

Amodeo's claims for Strict Liability, Implied and Express Warranty, Negligence, and Emotional Distress. It does not however bar the claims under Fraud and Conspiracy pursuant to the holding in Pulmosan Safety Equipment Corp. v. Earl Barnes, 25 FLW S12 (case # SC 94544 January6 2000) which recognizes an exception to the Statute Of Repose in the case of continuing fraud.

The Motion for Directed Verdict on the Statute of Limitations re: Frank Amodeo is GRANTED as to the Counts of Strict Liability, Implied Warranty, Express Warranty, Negligence, and Intentional Infliction of Emotional Distress, and DENIED as to the Counts of Fraud and Misrepresentation, and Conspiracy to Misrepresent and Commit Fraud.

Federal Preemption

The seminal case regarding Federal preemption in tobacco cases is Cipollone v. Liggett Group. 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2nd 407 (1992). That case specifically exempted claims of Fraud and Conspiracy to commit Fraud and Misrepresentation from the pre-emption effect of the 1969 Act.

> "In the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from long standing rules governing fraud. . . Petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions are not pre-empted . . . such claims are...predicated on . . . the duty not to deceive."

The 1969 Act does not pre-empt any claim for acts committed prior to 1969 in any event, and certainly does not pre-empt any acts of fraud or conspiracy committed by the defendants subsequent to 1969. The record in this case is replete with evidence relating to the fraud and conspiracy

claims which the jury apparently considered , and believed, in finding the defendants guilty of those counts.

As to the issue of addiction, there seems to be a head on conflict between the issue of "failure to warn" after 1969, and the concept that the defendants had a "duty not to deceive". Given the merits of those claims, and the realization that the defendants had the knowledge that nicotine addicts as early as the 50's and 60's and still publically declared, well into the 80's and 90's, that nicotine is not addictive, the record of the trial reflects that the plaintiffs presentation opted for evidence of a "duty not to deceive' which goes directly to the fraud and conspiracy exception under *Cipollone*, rather than the "failure to warn" preemption element. Also see Joiner v. McCullers, 28 So 2nd 823 (Fla.1974).supra.

The motion for Directed Verdict on the grounds of Federal Preemption is DENIED.

Failure to Warn Pre-1969

For guidance the Court relies on the decision in Burton v. R.J. Reynolds Tobacco Co., 884 F.Supp. 1515 (D. Kan. 1995), which definitively rejected the defendants theory that there was no duty to warn because everybody was aware of the dangers of smoking. The defendants position is disingenuous because the defendants for decades had decried the health risks of smoking and publically stated that there was no conclusive proof cigarettes caused disease. At the same time the defendants were aware that nicotine was addictive —— something the general public did NOT know. Also, the defendants were under a duty not to deceive. This concept can be stated in no clearer terms than the words of the Court in Joiner v McCullers, 28 So 2nd 823 (Fla 1947).supra.

The Motion for Directed Verdict for Failure to Warn is DENIED.

Motions for Directed Verdicts on Behalf of Council For Tobacco Research and Tobacco Institute

Despite protests by these defendants that the plaintiffs were unable to point to any specific act of either of these defendants to establish plaintiffs claims, the jury, having found these defendants guilty on all counts for which they were charged, apparently found enough in the evidence to conclude that the thousands of pieces of information to which the plaintiffs were exposed over several decades, came from the concerted efforts of the defendants to provide such information to the public. Ironically, the defendants claim the plaintiffs could not possibly have known, and or, relied on the content of such dissemination, while at the same time arguing that the defendants cannot be held liable because over the years everybody knew of the dangers of smoking from other unnamed sources.

Since each of these defendants were acting on behalf of, or in concert with, the other defendants in the case, the jury reasonably could, and apparently did, conclude these defendants were guilty of fraudulent representation, concealment and conspiracy.

The motions for Directed Verdicts as to the Council For Tobacco Research and the Tobacco Institute are DENIED.

Application of Michigan and/or New York Law

This issue has already been decided by Judge Postman in his pre-trial order of January 6th, 1998 and is the law of the case. That order sets the principle that if a plaintiff was in the State of Florida at the time the medical condition was diagnosed and the causal relationship with smoking had manifested itself, and the plaintiff was a resident of Florida at that time, then the law of Florida would apply regardless of the fact that the plaintiff had resided in another State and smoked prior to the diagnosis.

The Motions for Directed Verdicts on the application of Michigan and/or New York law are DENIED.

Motion for Directed Verdict on the issue of Punitive Damages

The jury having heard the evidence submitted during the Phase I trial, definitively determined that the conduct and the behavior of the defendants rose to a level to entitle the plaintiffs to an award of punitive damages. The Court having heard the same testimony and evidence concurs the proofs were clear and convincing.

This motion is DENIED as to ALL defendants

OTHER MOTIONS FILED ON BEHALF OF THE DEFENDANTS MOTIONS IN LIMINE

The defendants in this case have filed numerous other motions, most of which were MOTIONS IN LIMINE or which in some regard related to the presentation of evidence. Most, if not all , were resolved during the evidentiary portion of the trial as the testimony was elicited and were either denied, or sustained in whole or in part or mooted, as the record will reflect, therefore there is no need to rule on those motions here.

MOTIONS FOR MISTRIAL

The Court has carefully considered the Motions for Mistrial in this cause and has determined that curative instructions to the jury, and/or motions to strike have been granted as requested by the movant, for most of the motions, and in any event the cumulative effect of the alleged error, was not in the opinion of the Court, sufficient to have so influenced the jury as to affect the outcome of the case considering the length of the trial, the number of witnesses presented, the quality and quantity of the testimony, the huge amount of documentary evidence, and specifically the substance of the alleged remarks. The jury in this case rendered three verdicts, each based upon a mountain of evidence over a period of two years in three separate trials. The court feels confi-

dent, that although some remarks of counsel may have been uncalled for, or subject to objection, they were not so egregious as to require a new trial. THEREFORE:

All Motions for Mistrial which have been previously deferred or not previously denied, are hereby DENIED.

It should be noted here, that at the close of the Phase II B (punitive damages) trial, the defendants filed a plethora of motions, all outlined in a 190 page motion for New trial or Remittitur, to Set Aside the Verdict and for Entry of Judgement based on previous Motions for Directed Verdicts, Mistrial, and for Decertification.

The Court has already ruled upon the Motions for Directed Verdicts and Mistrials herein, however a review of the voluminous **Motion for New trial** reveals far too many alleged assignments of error for the Court to address on a one on one basis. In fact, the motion ostensibly reviews every objection raised during the entire two year, three phase trial and over 57 thousand pages of transcript. As to each of the objections raised during trial, the Court entered a ruling resolving the issue at the time the objections were made, and sees no reason to reverse itself at this time, nor does the Court feel that just because possibly hundreds of objections were made, that this necessarily resulted in such a cumulative error as to require a new trial. The Court has reviewed the motion and all the alleged errors cited, and has determined that on the merits of each claim, the motion is unsustainable.

Therefore: The Motion for New Trial is DENIED.

This leaves two issues to be resolved by the Court for which the Court feels a comment is appropriate: **Decertification and Remittitur**.

DECERTIFICATION

Although, the 3rd District Court of Appeals and the Florida Supreme Court have already addressed the issue of Certification, approving preliminarily the case to proceed as a class action case, see R.J. Reynolds Tobacco Co.,v. Engle, 672 So.2nd 39 (Fla. 3d DCA 1996) and Review Denied. Fla. S.Ct. Docket No. 88235 10/2/96., the matter is still before the Court for a ruling on Defendants Motion to Decertify, at the close of all the evidence.

This case was divided into separate phases-the first phase was to determine the common issues of liability, causation and entitlement to punitive damages. The second phase was a trial on the claims of three class representatives involving issues of individual compensatory damages, causation and comparative fault. The third phase involved the issue of the amount, if any, of punitive damages in the aggregate.

The jury found for the plaintiffs in all three phases generally, and assessed compensatory damages of over **12 million dollars**, and punitive damages in the neighborhood of **145 billion dollars**.

In assessing whether a case should be classified as a "class action" lawsuit, controversy has arisen in product liability cases as compared to mass tort or accident cases. In product liability cases individual issues often outnumber common issues due to the fact that no single event has brought about the injury complained of, nor is there generally any single proximate cause which applies equally to all potential class members. Moreover, affirmative defenses such as Statutes of Limitation, Statutes of Repose and concepts of reliance etc, may depend on facts peculiar to each plaintiffs case.

The Court in Amchem Products. Inc. v. Windor, 117 S.Ct. 2231, speaking about the 1996 revision of Rule 23 noted the committee opinion that mass tort cases are not ordinarily appropriate for class action, but the text of the rule

does not categorically exclude mass tort cases from class certification. Since the late 1970's, courts have been certifying such cases in increasing numbers. See Resnick, From "Cases" to " Litigation ", 54 Law & Contemp. Prob.5, 17-19 (Summer 1991) (describing trend). (emphasis added).

In trying to determine whether a case should be certified as a class action, a majority of the courts look to three criteria: 1.) tort maturity, 2) efficiency and manageability, and 3) negative value.

TORT MATURITY

Not until torts are classified as "mature" and general causation has become relatively clear, will such cases be candidates for class action treatment. "Manual for Complex Litigation (Third) S 33.26 (1997).

In Costano v. American Tobacco Co. (5th Cir.1996) decertification was based on an "immature tort". That case intended to encompass all potential future tobacco related personal injury claims against the Tobacco Industry, whereas the instant case involves only those who have an immediate disease or condition. It should be noted that this Court has denied the plaintiff's claim for Medical Monitoring precisely to avoid the pitfall of the Castano case and Barnes v. American Tobacco Company, 161 F.3rd. 127 (3rd Cir.1998) The Court refused to allow potential claimants who have not manifested a disease or condition to become a member of the class, therefore this is not an "immature tort" issue.

EFFICIENCY AND MANAGEABILITY

In part, this requirement is designed to evaluate whether the resolution of cases by class action is a viable and judicially economic alternative to individual suits.

The Castano decision to decertify the class action based its ruling on the fact that the lower court has not considered how each claim in the complaint varied under the law of difference states and on the fact that the lower court did not make a finding of whether litigation is manageable in light of

these differences. Id. at 739. The Castano court found that there were "extensive manageability problems" which included "difficult choice of law determinations, sub-classing of eight claims with variations in state law, notice to millions of class members, further sub-classing taking account of transient plaintiffs, and the difficult procedure for determining who is nicotine dependent." Likewise

in Georgine v. Amchem, 83 F.3d 610, 632-33 (3rd Cir. 1996), as well as in Castano, a lack of judicial efficiency also derailed the proposed class.

However the instant case is unlike Georgine or Castano in that, the trial plan has effectively allowed the determination of general issues" en mass", thereby conserving the Court's resources by then only requiring Phase II trials to determine individual issues of liability and entitlement particular to each representative member of the class. In the *Castano* case, the court portended 1) problems involving the manageability issues regarding the notification to a class of millions; 2) sub-classing for transient residents; and 3) problems with superiority requirements due to individual reliance and immaturity of the tort. The Court believes it has successfully addressed and allayed the above concerns of the Castano court.

First, since the immediate class has a much more limited size and involves only Florida residents and Florida law, the Court has been able to effectively notify its potential members without having to concern itself with the variations of state law which were endemic in Castano.

Secondly, unlike Castano, the instant case involves a much smaller population, involving only residents of Florida who had manifested a disease or made a causal connection thereto. Because Florida law is the only law to be applied to determine the rights and liabilities of the parties with respect to the instant action, this Court has been able to create a touchstone which will help determine the "choice of law"

analysis for the Plaintiff class, thus the shortcomings of the Castano case in regard to transient residents has been successfully avoided in the instant case. See infra Engle Class Order dated January, 1998.

Thirdly, and again unlike the *Castano* court which based its decision to decertify on the assumption that at the time of decertification individual reliance may come to undermine the superiority requirement for maintaining a class action, the instant action has successfully avoided the problems associated with reliance in class action suits. Although Florida courts have an aversion to class action treatment for breach of contract or fraud claims, it is in limited circumstances, appropriate for class action. See Lance v. Wade, 457 So.2d 1008 (Fla.1984); see also Broin v. Philip Morris Companies, Inc., 641 So.2d 288.

In addition, since fraud has been shown by the Plaintiffs to be a result of deception and artifice, fraud may, under Florida law, be based upon an omission or non-disclosure. See Taylor v. American Honda Motor Co., Inc., 555 F.Supp.59 (M.D.Fla.1983). In such instances, the courts have recognized that a fraud class action based on an omission or non-disclosure is appropriate for class actions.

As such, the issue of superiority vis a vis individual reliance is no longer dispositive, as several courts, in similarly situated cases involving omission or non-disclosure, have found that reliance is not an obstacle to class action. See Keyser v. Commonwealth National Financial Corp. 121 F.R.D. 642 (M.D.Pa. 1988).

At the close of Defendants' case, it has become apparent to this Court that class action treatment is superior to pursuing this matter by individual claims. If Plaintiffs were required to try their cases individually, issues such as reliance, causation, defendants knowledge, intent, or reckless disregard, and defendants' financial capacity, etc., will have to be litigated many of thousands of times. This is more than mere

speculation. After having sat through the enormous complexities involved in this trial, it is self-evident that any trial would have to involve similar proceedings. And if there were to be individual trials, it is inevitable that the common issues of Defendants' conduct would become a predominant aspect of each trial, which could result in conflicting verdicts thus proving that common issues become the most prominent aspect of this case.

The closest parallel this Court can find to the instant case is asbestos litigation, which is undoubtably one of the most complex of all mass tort litigation. See Ahern v. Fireboard Corporation, 162 F.R.D. 505, 528 (the primary factual and legal issues such as disease causation, product, situs and defendant identification and standard of care have been identified and developed through extensive litigation; despite the maturity of asbestos litigation, it continues to be expensive, time-consuming, and complex.) The same can be said for tobacco litigation since it also has fully developed and resolved issues, and is subject to extensive litigation, thereby, contributing to the delay, high transaction costs, and arbitrary results that have become such a burden to the judicial system, (and providing further argument for the need to resolve these issues through class action litigation).

The Court is also aware that there exist legitimate Seventh Amendment concerns when a multi-phase trial involves separate and distinct issues of general and specific causation. However, the trial plan clearly limited general causation issues to Phase I and there was little to no risk that such issues would be revisited in any subsequent phases. See In re: Dow Corning Corporation, 211 B .R. 545 (E.D. Mich.1997) (In that case the trial court held in regard to separate trial for general causation, the VII Amendment would be a concern if a specific causation/damage jury revisited the issue of general causation in its deliberations. However, experienced trial judges in conjunction with parties could overcome that pitfall through careful controls over trial processes, and could

minimize the danger of allowing a second jury to re-examine findings of first jury).

Likewise, in Cimino v. Raymark Industries, Inc. 151 F.3d 297 (5th Cir.1998), the court approved a trial plan that adequately individualized and preserved the Seventh Amendment rights with respect to each individual's actual damages from an asbestos-related disease. Although that court ultimately held that the use of "extrapolation plaintiffs" in that case violated the VII Amendment, the court did find that such a plan can constitutionally divide general and specific causation. See also Jenkins v. Raymark Inds. Inc., 782 F.2d 468 (5th Cir.1986), (justifying class trial of common issues and individual trials of individual issues of exposure - causation and damages).

Several courts involving matters other than asbestosis have also allowed the separation of general and specific causation. For example in Sterling v. Velsicol Chemical Corp. 855 F.2d 1188, 1200 (6th Cir.1988), a personal injury suit by individuals living in the neighborhood of a landfill allegedly contaminated by defendant, the Sixth Circuit noted that

> "the [trial] court, as is appropriate in this type of mass tort class action litigation, divided its causation analysis into two parts. It was first established that Velsicol was responsible for the contamination and that the particular contaminants were capable of producing injuries of the types allegedly suffered by the plaintiffs. Up to this point in the proceeding, the five representative plaintiffs were acting primarily in their representative capacity to the class as a whole. This enabled the court the determine a kind of generic causation-whether the combination of the chemical contaminants and the plaintiffs' exposure to them had the capacity to cause the harm alleged. This still left the matter of individual proximate cause to be determined. Although such generic and individual causation may appear to be inextricably

> intertwined, the procedural device of the class action permitted the court initially to assess the defendant's potential liability for its conduct without regard to the individual components of each plaintiff's injuries. However, from this point forward, it became the responsibility of each individual plaintiff to show that his or her specific injuries damages were proximately caused by ingestion or otherwise using the contaminated water".

See also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1229, 1234 (9th Cir.1996) (in certifying Fed R. Civ P. 23(b)(3) as a class in prescription drug products liability suit, the district court "specifically excluded the individual issues of proximate causation, and compensatory damages";).(Class certification reversed on other grounds, but Fed R. Civ P. 23(c)(4)(A) exclusion of individual issues, essentially approved). See also Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir.1992) (panel affirmed trial plan for determination of liability and punitive damages to be followed by trials on individual issues).

Given the above reasoning, this Court held that in Phase I, the jury was required to determine, among other issues:, 1) whether smoking cigarettes caused the disease(s) in question, 2) resolve general issues of causation, 3) determine the extent of the defendants wrongful conduct, and 4) determine entitlement to punitive damages. The jury returned verdicts in favor of the plaintiff on all those issues., The same jury in Phase IIA was then asked to: among other issues, 1) determine individual issues of causation for the class representatives, and, 2) determine the representative class members compensatory damages. Again, the jury returned verdicts favorable to the plaintiffs. In Phase IIB, the jury was required to determine the amount of punitive damages to be award in the aggregate against all defendants. The jury, after hearing two years of trial in three stages, returned a multi-billion dollar punitive damage award.

In Phase III, the individual claims of the class members will be tried before different judges and different juries to determine whether the injuries complained of were the result of cigarette smoking or from other causes, and what if any, damages resulted from that activity. The Juries in Phase III will not be concerned with the general causation issues of the previous trials, nor the conduct or behavior of the defendants, or punitive damages, those issues have already been resolved, and subsequent juries may be so instructed.

The Defendants would be permitted to introduce evidence limited to the specifics of the individual plaintiff's circumstances. For example, the Defendants would be permitted to show that the plaintiff has a genetic pre-disposition to the disease, that s/he smoked cigarettes for too short a period of time for symptoms to have been caused by smoking cigarettes, or that the disease was caused by some other activity etc. Future Courts and Judges can, by skillful control of their cases, eliminate the danger of allowing a second jury to re-examine the findings of common issues determined by the first jury in Phases I, IIA and IIB

Parenthetically, the Court is also aware of the due process problems associated with findings of liability for class actions of unspecified size. The Court feels that a statistical finding of the class size preserves the Defendants' due process rights while at the same time preserving Plaintiff's individual rights to trial. Thus any claimants' rights are preserved through this action which otherwise would have precluded tort claimants for their day in court and many claimants who would never live to see their cause litigated nor have the opportunity to receive compensation have had an opportunity for redress.

NEGATIVE VALUE

Finally, we address the issue of whether the case is a "negative value" suit. Negative value suits "permit the plaintiffs to pool claims which would be uneconomical to litigate

individually." See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809. 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); see also Rhone-Poulenc, 51 F.3d 1293 (7th Cir.1995). Thus since issue of negative value does not inure to either Defendants or Plaintiffs in the instant action, the Court will not find it to be dispositive as to the superiority question. See also Ruiz v. American Tobacco Company, 180 F.R.D. 194.

CONCLUSIONS REGARDING DECERTIFICATION

For the reasons above, the Court record establishes in a clear fashion that there has been resolution of the problems concerning immaturity of tort, efficiency and manageability, and negative value. Thus, decertification is inappropriate in the instant action. The class certification and trial plan calling for trifurcation of the issues is the preferred option in this case.

Therefore: The Motion To Decertify The Class is - DENIED

REMITTITUR

The issue of Remittitur has been reserved for last because it was last in the scheme of things during the trial.

The case as has been stated above, was tried in three stages, the last being a punitive damage phase. The jury returned a multi-billion dollar verdict against the defendants to wit:

Philip Morris, Incorporate	$ 73,960,000,000
RJ Reynolds Tobacco Company ----	$ 36,280,000,000
Brown & Williamson Tobacco -----	$ 17,590,000,000
Corporation, individually and as successor by merger to the American Tobacco Company.	
Lorillard Tobacco Company/--------	$ 16,250,000,000
Lorillard, Inc.	
Liggett Group Inc,/Brooke Group --	$ 790,000,000

Holding, Inc.

Council For Tobacco Research------ $ 1,105,210

Tobacco Institute- ---------- $ 278,339

The defendants have attacked the jury verdict as excessive and unreasonable and have asked for a new trial or in the alternative, a remittitur.

A remittitur is generally controlled by the principle of whether the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct. Arab Termite and Pest Control Of Florida, Inc., et al., v Jenkins Fla., 409 So 2nd 1039 (S.Ct.1982). In addition thereto, it must be determined whether the award is out of proportion to the defendants net worth or ability to pay without going into bankruptcy or going out of business. see: Bould v. Touchette, 349 So 2nd 1181, and Jones v. Greely, 25 Fla. 629, 6 So 448 (1889).

The "reasonable proportion" controlling in this type of case must, of course, be affirmatively supported by the record, or the judge must find that the jury was influenced by matters outside the record. (Arab Termite supra). Another consideration is the meaning and effect of the term "net worth" as it relates to the imposition of punitive damages. Although net worth can simply be stated as the end result of comparing assets against liabilities, it is not the end-all when determining an award of punitive damages. The jury has the right to determine, when deciding punitive damages, the "financial resources" of a defendant see:. Florida standard Jury Instructions (Civ) subparagraph (2) PD 1b (2). Therefore, "net worth' is only one factor in determining the "financial resources" of a defendant.

Before going further, the court feels it necessary dispose of the issue of "outside influence". The Court has determined that there is **no evidence** that the jury in this case was influenced by any matters outside the record. In fact the

Court took special pains to instruct the jury on a daily basis about reading anything, seeing anything or listening to anything from any source whatsoever, be it radio, T.V., newspapers, magazines, the internet or conversation with others, that might have anything to do with the issues or subject matter in this case, and /or which might influence their verdict. The jury was told they must return a verdict based solely on the evidence and testimony adduced in court and on the instructions from the court and from no other source. The jurors were interrogated each day of trial by the Court, (the parties also had equal opportunity to question the jury), as to compliance with this instruction. After carefully evaluating the jury and their responses to the Court's inquiry, the Court is well satisfied that the jury was **NOT** influenced by any matters outside the record. **Nor**, in this Courts opinion, was the jury **unduly** influenced by matters **even experienced at trial.**

This then leaves the issues of whether the punitive damage award is out of proportion to the defendants conduct, or the defendants ability to pay, or both.

CONDUCT OF THE DEFENDANTS

The first major issue to be discussed is whether the ***conduct or behavior of the defendants*** warrants the $144.08 billion dollar punitive damage award, and whether the award "shocked the conscience of the Court," and therefore, whether a remittitur should issue.!!

This Court sat through two years of trial, listened to over 150 witnesses, heard over 57 thousand pages of testimony and conducted hundreds of hearings on legal and evidentiary issues in addition to becoming familiar with the complexity of the issues from the very inception of the filing of the complaint in 1994. The Court truly believes it has more of an understanding of the case than any nonparticipant, and is in a better position to render such a judgement. Remember, the

issues in this case go back to the 30's, 40's and 50's — seventy years or more of conduct by the defendants which led to the complaint in 1994 and which on some issues, continues to the present. That is what makes this case so unusual and unique.

At first blush, a $144 **BILLION** dollar punitive damage award seems so far outside the comprehension of any reasonably thinking person that one would immediately say it is shocking and not in keeping with rational thought. However, keep in mind the enormity of the seventy years of behavior and the almost incomprehensible damage that was done to such a huge number of people. There has been testimony in this case that 400 thousand people have died each year from the ill effects of smoking tobacco products, and hundreds of thousands of people contracted diseases and suffered, and still suffer, the horrible effects of those diseases. The enormity of the damage is mind boggling, as is the realization that the ill effects of tobacco smoking was known as far back as the turn of the century!. Health official for years struggled with the concept of causation and sought through the scientific world to bring the matter to the attention of the public. The tobacco industry fought them at every turn, decrying the concept of causation and rallying behind the defense of "free choice".

The proof of the pudding, as it were, was in the fact that back in 1953 Dr. Wynder with his mouse painting studies, announced to the public, a link between smoking and cancer. This led to the formation of the "Tobacco Institute Research Committee (TIRC), [later known as the Council for Tobacco Research (CTR)] by the tobacco industry which then resulted in what has been known as the "Frank Statement" in 1954. This was a statement published in 400 newspapers aimed at 43 million Americans, explaining that the tobacco industry recognized the dangers involved in smoking tobacco, and pledged to conduct a concerted research effort to develop a safer product, and to keep the public informed of its research

results. The major tobacco companies of the day (the defendants in this case) all signed off on the document (with the exception of Liggett.). TIRC meanwhile, acting as a public relations arm of the tobacco industry, engaged in a concerted effort to refute any claims of health dangers as a result of smoking. A publication called "Tobacco and Health Research" was created to disseminate false and misleading information regarding the issue of causation. Although the defendant tobacco companies had promised full public disclosure of it's findings and research, the defendants, via The Council For Tobacco Research, suppressed reports and attacked research. In 1954, Liggett & Meyers, as it was known then, hired Arthur Little to duplicate Dr. Wynders skin painting tests and he got the same or similar results-but those results were never made public by the defendants.

During the ensuing years, the tobacco industry and the defendants became aware that tobacco smoke contained over 4,000 compounds, and over 40 carcinogens but did not reveal that information to the general public. In fact, the defendants knew about the addictive nature of nicotine as early as the 60's, and in 1972 in a Philip Morris report at a CTR conference a statement was made "without nicotine there would be no smoking" . . . and . . . "cigarettes are a dispenser for a dose of nicotine".

As a matter of fact, tobacco scientists learned how to manipulate the levels of nicotine in cigarettes by adding ammonia to produce a "freebasing" nicotine which speeded up and enhanced the effect of nicotine on the brain. They also were able to develop the Y-1 strain of a high nicotine content tobacco plant grown in a foreign country In addition, company scientists were able to devise ways of manipulating tar and nicotine content in cigarettes thus lulling the public into believing there was a "safer" cigarette.

Evidence existed regarding the conspiracy and fraud activities of the companies in the form of a so called "Gentlemens Agreement" not to do independent research., with

the idea of suppressing unwanted or damaging research results. Also, under some circumstances, research results were sent to company offices over-seas in order to prevent discovery.

Another problem area was the setting up of the "Special Project" unit of CTR, in which attorneys either controlled or had a say in determining which research projects would be undertaken and by whom. The way it was structured allowed the companies to claim an attorney-client privilege whenever necessary. Comment was made on this very subject by Federal Judge Sarokin in Haines v. Liggett Group, Inc 140 F.R.D. 681 D.N.J.1992 who said defendants used the attorney- client privilege to hide documents-never intending to give full disclosure, and he called it a fraud to mislead the public Judge Sarokin also said in that opinion ". . the tobacco industry may be the king of concealment and disinformation" In conjunction with CTR, the defendants established the "Tobacco Institute" and used it as a lobbying arm with government agencies to advance certain position strategies such as the "multi-factorial hypothesis", and the "genetic" defense, to counter-act the series of Surgeon General's Reports, and the studies of the scientific community.

The record also reflects that in 1994, the C.E.O's. of the defendant companies went before congress and swore under oath that cigarettes and /or nicotine was not addictive, even though there was evidence as far back as the 60's to the contrary. That position was also voiced by the Vice President of the Tobacco Institute Brennan Dawson in 1994 who said cigarettes are not addictive, nor has it been established scientifically that smoking cigarettes was harmful to health. Dr. Alexander Spears of Lorillard denied before congress that the defendants manipulated nicotine levels. Charles Whitley of Tl echoed that denial. However, in 1981,Dr Spears in an article for the 3rd Tobacco Chemists Research Conference had discussed manipulating nicotine levels. The defendants continued to claim that there is no proof that cigarettes cause

harm. This, in face of the many Surgeon Generals reports and other scientific evidence, over several decades, that spelled out the harm caused by smoking, specifically lung cancer and a long list of other diseases. Throughout the decades since the "Frank Statement", the evidence revealed that the tobacco industry, specifically these defendants, have followed a line of telling the public that there is no scientific proof of "causation" and no verified link between smoking and disease, when their own research proved otherwise.

Evidence at trial was replete with the history of denials by the defendants about the health effects of tobacco. Trial evidence outlined the techniques of billion dollar advertising campaigns to sell their products to the public in general and youth in particular. Many documents from the defendant's files revealed reports, conferences, discussion and memo's dealing with youth and gender marketing and strategies to deny such practices..

Over-all, the entire two year trial record was full of examples of deceit, denials contrary to research results, efforts to conceal or suppress information, collusion among defendants to insulate themselves collectively from public and the scientific and public health communities criticism of the industry, and either outright misrepresentation, or failure to acknowledge that which was proven and obvious.

As a result of years and years of such activity, the public was led astray and confused by the seeming conflict in the evidence about the harmful effect of tobacco, and kept in ignorance about the addictive nature of nicotine, and suffered untold misery and harm, including death, from the diseases, i.e.: cancer, emphysema, heart and circulatory problems, etc, all resulting from the use of the product.

If one really examined the entire record in detail of the decades of abuses committed by the defendants upon an ill informed and unsuspecting public, one could say it was that concerted behavior on the part of the Defendants, over so

many years, affecting so many people, that **"shocks the conscience of the Court", not the award itself.**

In Phase I of the trial, the jury, having heard the testimony concerning the behavior and conduct of the defendants, decided that punitive damages were indeed appropriate in this case, and in Phase IIA the jury set those punitive damages as outlined herein.

Therefore:

As to the first issue — *behavior of the defendants*—, this Court has no problem accepting the rational of the jury who heard all the evidence, that the award is warranted because of the behavior of the defendants. In other words, the Conscience of the Court is **NOT SHOCKED** either by the fact that an award was made, nor by the amount of the award rendered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

ABILITY TO PAY

THE PLAINTIFFS POSITION

Dealing next with the issue of ***ability to pay***, the testimony on the plaintiffs side came from two experts who testified about the "financial worth" of each of the defendants, utilizing certain criteria they felt were in compliance with generally accepted standards of persons who evaluate businesses. Although there was controversy about the method used to make the calculations, Mr. Cherner testified that based on a projected figure that one percent of market share was worth $1.5 billion, then each defendants "worth" can be calculated by the percentage of market share attributable to that defendant. Those calculations resulted in the following: (estimated values).

	MARKET SHARE %	MARKET SHARE VALUE $
Phillip Morris	49.3	73.95B

R.J.Reynolds..... 24.12 ..... 36.18B

Brown & Williamson 14.0 ..... 21.B

Lorillard..... 10.7 ..... 16.05B

Liggett ..... 1.2 ..... 1.8B

In addition to the above, the plaintiffs experts opined that net worth is not an accurate measure of a company's value. Net worth is reflected in a balance sheet, sometimes called book value, but the true worth of a company is based on net worth(book value/ balance sheet), plus intangibles, which in this case includes good will and trademark. In that event, the resulting values as calculated by the testimony, are fairly close to the figures above: (Philip Morris .$80B, RJR..$36B, B & W..$22B, Lorillard.. $17B, and Liggett.. $1.8B.).

JOSEPH CHERNER

Plaintiffs expert Mr. Cherner indicated that his calculations are based on the only available comparables in the industry-the purchase by Philip Morris of 3 Liggett brands, which he then used to extrapolate the value of the other defendant companies. He therefore opined that since this was a Philip Morris estimate of another tobacco companies brand worth, therefore it is a more accurate indication of true worth of a company.($300 M for .2% of 1% of market share, which makes each 1% of market share worth $1.5 billion) see chart above..

Mr. Cherner, in his testimony made several points . He said, for example, that RJR net worth is not the true value of the company -it is only stockholders equity, and RJR's worth is $37.5 B or 5 times what RJR reports on it's 10K. He said according to the way Philip Morris determined value in the purchase of the Liggett brands, Philip Morris brands are valued at $75 Billion, and RJR is worth $37.5 billion, and he would use the same formula to value B & W and Lorillard, because Philip Morris would be in a better position to know

better than anyone in the world what cigarette brands are worth. He also said that when Philip Morris valued its own brands at $75B it is valuing its brands including the legal liability it faces from this day forward.

Mr. Cherner also said that the defendants, in order to pay the $250 billion MSA/FSA obligation, simply raised prices 4.5 cents a cigarette and generated $21 billion, and if by raising prices there was a decrease in consumption by 10%, they would still raise $19 billion per year forever.

In another opinion, Mr. Cherner testified that Lorillard's valuation of market share would most likely be identical, and if not very similar, to Philip Morris's valuation of market share to-wit,:$15-16 billion dollars, even taking into account adjustments for assets and liabilities.

He also said that although Lorillard does not have $15 B in the bank, that does not mean by any stretch of the imagination, that Lorillard cannot take place in a punitive damage award that collectively would come to $250 Or $300 billion.

As for the M.S.A. § and the FSA, Mr. Cherner agrees that the $250 billion is to be paid out over a period of years-however he also acknowledges that the defendants have been able to make payments of up to $10 billion dollars or more, adjusted for inflation, per year since the institution of the "Agreements".

When asked by the defense about how much Philip Morris can pay in punitive damages, Mr. Cherner said since Philip Morris has 50% of the market share, it should pay 50% of the punitive damage award.

With reference to RJR, Mr. Cherner said there is a confusion about calling shareholder equity net worth. If assets were valued at market prices and the liabilities were valued at market prices, then shareholder equity may mean the same thing as net worth, however very often assets are not valued at market level — for example one may have a building valued on the books for one million dollars, that is presently

worth $100 million, but still the book shows a value of only one million. So most often, assets minus liabilities does not equal stockholders equity. Mr. Cherner also said that it is misleading to the jury to say that RJR has a net worth of $7 billion dollars. It implies that is the value of the company, but it is not. It is the stockholders equity figure and is not net worth.

In regard to Liggett, under cross examination, Mr. Cherner opined that with reference to the M.S.A. § and the FSA and the ability of the defendants to raise $20 billion dollars a year in extra income by increasing prices, . . .", this amounts to a present value of between a $200 billion and a $400 billion dollar settlement. So if we're trying to value what $20 billion dollars a year would be worth in a punitive damage award, it would be worth a present value of an award of anywhere between $200 billion and $400 billion dollars. That's what a punitive damage would be worth under that scenario. He also said he was aware that Liggett has paid zero or a negligible amount under the MSA.

Concerning Brown and Williamson, Mr. Cherner said B & W was the only one of the defendants that was not doing well after the MSA-losing some market share from about 14% to around 11.6% currently. B & W operating income has also declined but still shows a net income of $215 million.. He also was unaware that B & W has received a negative one billion rating from organization such as Smith Barney or Credit Suisse.

PROFESSOR GEORGE MUNDSTOCK

The other plaintiffs expert, Professor Mundstock in essence echoed Mr. Cherners views on whether financial statements reflect true value. He said there are three types of financial statements-an asset account, a liability account and a equity account. A balance sheet is just a snapshot in time and does not represent an appraisal or evaluation. Intangibles

go into determining overall value-this is called intangible value -such as trademarks. Most of the time intangibles are not listed in the books. Generally speaking book value therefore, does not necessarily reflect market value.

He also said there is such a concept as market capitalization-the value of what a company thinks its stock is worth, however, the stock market value of the company doesn't fully reflect their ability to pay.

The real value of a business to an owner, he said, is the value of the cash they can pull out of a business and still keep going, and then figure out at currant interest rates, what that future cash is worth that's called capitalized earnings approach or present value approach or discounted earning approach. Prof. Mundstock said he used this type of approach because he did not have adequate comparables to work with. According to Prof. Mundstock, because there were no comparables he could work with, he took his best guess of what kinds of excess cash the business would throw off;: figured out what someone be willing to pay for that cash today and said that must be what the business is worth. He said he made those calculations based on information provided during the trial and reviewed some tax returns.

As regards Philip Morris, Professor said the parent company Philip Morris Companies inc, has several subsidiaries, one is called Philip Morris USA, another is called Philip Morris International.. Philip Morris stock which is traded on the stock exchange is held by the parent Philip Morris Companies Inc. The problem is then, how to value Philip Morris USA? According to Prof. Mundstock, a good part of Philip Morris USA profitability is because it owns some famous trademarks such as Marlboro, and Marlboro is sold internationally, and advertising in the USA sells Marlboro Internationally, and vice-versa-a sort of synergy exists with the sister corporation Philip Morris International which affects the value of Philip Morris USA. In his mind, Prof Mundstock said, to ignore the fact that Marlboro is a multi-national

trademark in a related corporation is to ignore the tremendous value of Philip Morris' worldwide business and the tremendous value they have in the U.S. because Marlboro is an internationally promoted and marketed product.

Because it was almost impossible to separate out Philip Morris USA from the whole picture, Prof. Mundstock said he used the cash flow method and Philip Morris's numbers, not on the separate company, but using the numbers Philip Morris allocated to tobacco on their public statement, he evaluated their tobacco business and came up with the figure of $118.5 billion dollars for the tobacco business of Philip Morris Companies Inc. He said he, kept in mind the ability of the parent corporation's to generate future excess cash flow, and then he figured the present value.

Referring to net sales of the defendant tobacco companies since the master settlement Agreement, Prof. Mundstock said the defendants sold between 435 billion and 475 billion cigarettes and raised the price by about 4.5 cents a cigarette. Therefore as far as net sales are concerned the figures show in 1999, Philip Morris net sales were up 28%-RJR net sales up 32.4%-B & W net sales up 19.4%-Lorillards market share increased 15%, and Liggetts operating income was up 41%. In the first part of 2000, both Philip Morris and RJR was ahead of 1999. The reason he said, is that the price went up more than consumption went down.

Professor Mundstock, then explained the meaning of "leveraged buyout" saying a company can buy out another company using money borrowed from a bank or sometimes multiple sources based on the value of the purchased company.

In addition to the above, using a standard of Philip Morris's purchase of the three Liggett brands , Professor Mundstock calculated the market share of the defendant companies and assigned a monetary value to the companies and came up with figures closely matching those found by Mr. Cherner.

Again, Prof. Mundstock said in order to determine the value of a company you must add the value of the intangibles to the "book" value to get a true value.

On cross examination, Prof. Mundstock said Philip Morris USA value of $6.4 billion dollars on its financial statement is its "book net worth" or stockholders equity. He also said his evaluation of $118.4 billion dollars is for Philip Morris USA and Philip Morris International combined (the tobacco business of Philip Morris), and represents what those businesses could be sold for today.

He also admits he has never been paid to evaluate a business, other than for tax purposes. He is not a CPA. or an economist, nor does he have a MBA.

Prof. Mundstock admits the defendants don't have on hand, the amount of money he valued the companies at, but he said, they could borrow the money, probably over a 6 month period, in the capital market.

As to how he reached the figure of $118.4 billion for Philip Morris tobacco business, Prof. Mundstock said he based it on present value of future excess cash, and that is based on the condition of the company in 1999 being fairly stable for the future years. He also said the cost of future litigation would directly impact future excess cash, as would sales and regulations. In making his calculations he did not take into consideration the size of the Engle class, nor the projected size of any compensatory award

Philip Morris's income statement shows for the year ending 1999, the net earnings, or profit reported was $ 2.99 billion dollars-40 times less than the $118.4 billion dollars figure used earlier, but that $118.4 billion is spread over 25 years, according to Prof. Mundstock.

Professor Mundstock when questioned about the two methods of evaluating business said he preferred the valuing of trademarks plus book value over valuing by trademark

value alone (the Philip Morris-Liggett deal) — but he did both just as a check.

As to Brown and Williamson, he does not agree with B & W figures showing that B & W is in poor financial condition-income was up 20% in 1999 from 1998 because they raised prices to meet the M.S.A. obligation. He did admit that B & W market share was down by one or two percentage points, but also said there has not been any negative analysts reports since the FSA for B & W. In fact the analysts reports since the FSA have predicted a 2 or 3 % growth in the industry adjusted for inflation-this would offset any loss of 2-3 percentage points in the last year. Decreasing profits would portend trouble unless you are measuring profits using financial accounting numbers.. Professor Mundstock said he realizes that dealing with competition in either premium brands or generic could affect the ability to raise prices and therefore market share would suffer — but he also said he would rather have 1% of a very profitable market, than 100% of market share for a product that doesn't sell. He also said his previous calculation of B & W's worth at $9.9 billion dollars was wrong and it is actually $22 billion.

Considering Lorillard, Prof. Mundstock points out that Lorillard on their financial statements shows the obligations to the M.S.A. as they are due, which is proper — but they also show the companies other obligations, even thought they are not due.

It is important to note here that when questioned on cross examination, Professor Mundstock said using the method he feels more comfortable with, book value plus intangibles, the value of Lorillard would be about $12.5 billion rather than the 16 billion using the market share method of Mr. Cherner. He also agreed that according to Lorillards figures their shareholder equity is around $921 million. In order to raise $12.5 they would have to sell off an interest in the equity of the assets since they don't own any stocks. His best guestimate is Lorillard could raise $10 Billion (adjusting the

$12.5 Billion equity for commission and expenses) by borrowing against, or selling the equity interest. Professor Mundstock also said that if it was structured as a sale, then Lorillard would be out of business.

Regarding RJR on cross examination, Professor Mundstock said, he previously testified that using the market share method, he would value RJR at $36 billion dollars, but by using the method he prefers, the value would be $19.6 Billion. The assets verses liability snapshot on the financial statement is not truly reflective of the company's financial picture. RJR sold off Japan tobacco and paid off billions in debt, but also bought back billions of their own stock without having to pay dividends. Currently, Prof. Mundstock agreed that after paying out all that money RJR no longer had a cushion and this was reflected in a currant ratio of less than 1 which is a low ratio and means the company is not very liquid in the short term.

Professor Mundstock did say when questioned, that if RJR would be required to pay $36 billion today, it would be out of business., or for that matter $19.6 Billion.

Regarding Liggett, Prof. Mundstock valued Liggett at $1.8 billion but said under the more preferred method the value would be $.9 billion. He also said that because Liggett has changed so much after the sale of three of its brands to Philip Morris, it was hard to figure what the future for Liggett will be. Although Liggetts books show cash or cash equivalent on hand to be less than $3 million, and currant assets to be about $81 million, Prof. Mundstock opined that in an industry that generates the kind of cash flow that the tobacco industry can generate, low numbers of cash on hand are less telling indicators of a company liquidity. He also said that even if a parent company of Liggett has outstanding some senior priority notes, those notes don't pledge Liggetts assets, only the parents stock, which doesn't affects Liggetts ability to go to the financial market for a loan. He also notes that even if Liggetts market share is down from 2.5% in 1995

to 1.2% in 1999, and unit volume has decreased by 50% from 1995 to 1999 to 5.2 billion cigarettes sold, Liggetts operating income is up 40%.

On Re-direct examination Professor Mundstock said that a company like Philip Morris which claims to have a net worth of $6.4 billion, but can pay $368 Billion in a proposed settlement agreement, can do so is for two reasons: one — the $6.4 billion is not their true value, and two because the payment are over time. These companies are cash cows, he said, and can throw off considerable cash flow over a period of time. They pride themselves on their cash flow and ability to generate cash.

Plaintiff experts also offered an opinion regarding ability to pay, saying that if the tobacco companies originally offered the U.S. Government 367 Billion dollars in a settlement in 1997, (which was rejected), and then, in 1998 agreed to pay the Master Settlement Agreement 250 Billion, even if over a period of years, this is an indicator of, at the very least, a present ability to pay a considerable amount against a punitive damage award. It was noted that the defendant tobacco companies ,under the M.S.A. agreed to pay approximately 20 Billion dollars a year over the next 25 years or so, and in order to make those payments, the companies raised the price of cigarettes approximately $1 a pack. Considering the defendants sell about 20 billion packs a year, this can amount to about 20 Billion dollars each year!!...most of the money, according to the testimony, therefore has come from the pocket of the consumer, and not from the pocket of the defendants.

THE DEFENDANTS' POSITION

On the defense side of the case it is interesting to note that none of the defendants produce an "expert" witness. The Court would have welcomed and indeed, would have valued the opinions of a defendants financial expert, and/or corporate financial officer. This would have been a great help in

resolving, not only for the Court, but also the Jury, the financial condition of the various defendants companies. However, the defendants relied instead, upon the testimony of the company C.E.O to discuss the company's financial position.

The following is a summary of that testimony.

MICHAEL SZYMANCZYK (Philip Morris)

Michael Szymanczyk, C.E.O. of Philip Morris basically testified that Philip Morris could not pay $127 Billion to the State on a settlement date in a single payment — that's why they had to raise prices to make the long term payment.. He claims that Philip Morris made $41 billion in the last 25 years, but will have to pay the settlement $93 billion in the next 25 years. According to him Philip Morris's net worth is $6.4 billion and if they had to pay that amount in punitive damages, the company would be out of business. Mr. Szymanczyk said valuing Philip Morris at $75 billion is wrong — it is more like $3.75 Billion. If someone offered $75 billion to buy Philip Morris, he would recommend the board of directors to accept the deal. He also said that to properly value a company one has to consider potential litigation liabilities which in the case of Philip Morris is quite substantial, and that would offset potential earnings. Philip Morris, he said, tried but could not borrow any significant amount of money. He did admit the future outlook is good for the company. He further said currant net worth of the company reflects the value of the Marlboro trademark because it reflects earning that come from that trademark.

NICK BROOKS (B & W)

Mr. Nick Brooks, C.E.O. of Brown and Williamson Tobacco Co, testified about B & W's financial condition and said the company's net worth was $642 million, and has a market share of slightly under 12%. Lorillard has about 10%, RJR about 22 or 23%, and Philip Morris about 50 or

52% of market share. He also said that while B & W had a 12% market share, it only has 6% of the industry profit. Mr. Brooks said that B & W has been hurt more by the M.S.A. and FSA than the other manufacturers. So far B & W has, according to Mr. Brooks, paid out $2.1 Billion in payments under the settlements. In discussing B & W's financial condition since 1996, Mr. Brooks said they made a profit of $295 million in 1996, $10 million in 1997, registered a loss of $482 million in 1998, and in 1999 realized a profit of $216 million. In the last 4 years Mr. Brooks said the company made only 1cent per pack sold. Under the FSA, B & W lost 17cents a pack because of the way Florida calculates their rate of payment. Currently, according to Mr. Brooks, the economic picture shows a gradual decline for B & W in market share. As to industry profits, Mr. Brooks testified that B & W has 6%, Lorillard 14%, RJR 17% and Philip Morris 63%.

When asked by defense counsel whether B & W could continue to raise prices to pay for significant punitive damages, Mr. Brooks replied "clearly not"-.that would accelerate the businesses decline. In fact he said the company had to lower prices to be competitive. On the issue of company valuation, Mr. Brooks said two entities, Morgan Stanley Dean Witter and Credit Suisse attempted to value the company and Morgan Stanley found a negative value of one billion dollars, and Credit Suisse found and even higher negative value. There also was a negative report from a Dutch firm ABN-Amro, which said B & W was declining because of competition and could face bankruptcy by the year 2012. On cross examination Mr. Brooks said the company is faced with "hundreds or thousands" of lawsuits but to date has not paid a dime to a single plaintiff.

Mr. Brooks says the value of B & W today reflected on its net worth statement is $894 million. He does say that there are other ways of determining the value of a company other than assets minus liabilities-for example a future cash

flow method. According to Mr. Brooks, if B & W loses 1.5 to 2 points additional share points, the company would go "under water".

Mr. Brooks also said that B & W has $2.4 billion due from affiliates with currant liabilities of $1.9 billion. B & W also has a credit-borrowing arrangement with BATUS Holding company which owes B & W $1.2 Billion coupled with $678 Million owed to B & W from foreign affiliates.

B.A.T. (British American Tobacco Co.), according to Mr. Brooks made two capital contributions to B & W — one in 1994 to support the purchase by B & W of American Tobacco CO, (about $1 billion) and another to allow B & W to enter the M.S.A. (about $459 million). That capital investment is not like a loan and doesn't have to be paid back, Brooks said, but B & W has to pay dividends on the funds. Mr. Brooks also said it was unlikely that B.A.T. would help finance a punitive damage claim-and said B & W has only $25 million in cash

ANDREW SCHINDLER (RJR)

Mr. Schindler testified that over the last 16 years RJR has raised prices $2.50-$2.75 per thousand, but in 1998 the price increase was $21 per thousand . He said RJR has shown a decline of 36% in volume from 1990 to 1999 . For example he said the decline in volume from 1996 to 1999 was from 119 billion cigarettes to 96 billion.. He expects a further decline in 2000 of between 2% and 4%. As to market share, RJR had 26.9% in 1996-and so far in 2000, 23.5%. A share point represents about 4 billion cigarettes. Mr. Shindler said that there are no funds available to pay for the M.S.A. or FSA obligations therefore RJR had to raise prices.

He said with reference to the balance sheet, RJR showed currant assets at the end of last year or $2.468 billion, and liabilities of $3.068 billion, and cash on hand of $600 million. RJR, also lists good will at $7.563 billion but claims they

cannot sell off good will as a separate asset. Continuing to testify, Mr. Shindler said income from continuing operations last year totaled $195 million-while net income showed $2.3 billion reflecting a sale of the international operation. He went on to say that RJR has made cash payments to the M.S.A. and FSA of $768 million in 1998, $1.6 billion in 1999, and estimates that for year 2000 the payment will be $1.2 billion. RJR also faces a substantial number of lawsuit with a potential large financial risk factor.

Concerning RJR stock, Mr. Shindler said the company bought back 6,370,656 shares of stock at a cost of 125 million when the stock was at $15-$16 a share. The stock was priced at about $31 a share the previous June. Since RJR didn't have to pay the $3.10 dividend they were able to save that cost and the stock to them was then worth $15-$16 a share.

Regarding the M.S.A. and other settlements, Mr. Shindler said RJR Is obligated to pay for the first 25 years, about $63.5B depending upon the number of cigarettes they sell and the size of the industry. Under the FSA, the company is obligated to pay $ 4.2B. Under cross examination by the plaintiff, Mr. Shindler admitted writing a letter to stockholders in which he painted a rosy picture of the company's future. In the letter he discussed how in 1999 RJR sold the international business for $8 billion and substantially reduced the company debt to about $2 billion, so that at the end of 1999, RJR had a debt of $2 billion with cash and equity of $1.2 billion and $7.1 billion respectively. The letter also said the leverage ratio is low and the cash flow was strong, and the strong balance sheet and cash flow allowed RJR to pay out nearly half of cash net income as dividends and simultaneously allowed RJR to repurchase stock shares.

BENNET LEBOW (Liggett)

Mr. Lebow testified that he sold three brands to Philip Morris because he had to or go out of business. The $300 million he received was used to pay off debts. According to Mr. Lebow, Liggett would not have paid $300 million for the brands but Philip Morris would because they owned the international brands and had the structure to exploit the brands He said it was not appropriate to value Liggett based on the Philip Morris sale because Liggett deals mostly in discount brands not premium. Right now Liggett does not have a willing buyer because of the potential of all the litigation it faces.

Regarding the MSA, Mr. Lebow said Liggett is not paying because they don't have enough volume-however by that time Liggett had already agreed with 41 other states to pay 30% of its earnings. He said since Liggett sells discount brands it does not compete with the major premium brands. Liggett is in competition with 20 other discount brands who are not part of the settlements and do not have to pay such an obligation. Liggett has no obligation to the M.S.A. unless its market share exceeds a base share of 125% of its 1997 market share or approximately 1.65% of the total cigarettes sold in the U.S.

Liggett is building a new plant which will produce 5.5 billion cigarettes a year which is financed by currant sales.

With reference to financial worth. Mr. Lebow said GAAP accounting and fair market value will give you higher or lower numbers-a company can have a net capital deficiency of $488 million, but be valued at $100 million.

On cross examination by one other defendant, Mr. Lebow testified that at the time of the M.S.A. Liggett raise prices part way even though they were not obligated to do so under the M.S.A. § criteria, and consequently Liggett made money unless its market share goes up above 1.67M. Mr. Lebow said Liggett is now doing well because of the fact that

he could raise prices to go along with the other defendants and doesn't have to make M.S.A. payment at Liggetts currant level Liggetts stock today sells at $17, up from $5 in 1996. Liggett has 20 Million shares of stock. Mr. Lebow testified that when valuing a company, look at the multiple of earnings and cash flow, a reasonable multiple of earning for a profitable company without significant liabilities is 5 to 5.5 earnings. A large foreseeable debt and a declining market can affect multiple earnings. Mr. Lebow conceded that Philip Morris has multiple earnings of less than zero according to the stock market-but he also said that he didn't think the M.S.A. obligation for Philip Morris had any significance to the stock market. Mr. Lebow said that Philip Morris raised prices, and the money to pay the M.S.A. is coming from the smokers and not out to Philip Morris's pocket. He also said that because of addiction, there not much of a limit on raising prices-maybe as much as $4 to $5. According to Mr. Lebow, Philip Morris can easily raise prices to pay a punitive damage award — Liggett cannot.

MARTIN ORLOWSKY (Lorillard)

According to Mr. Orlowsky Lorillard has 10% of the market, down .75% from the previous year. In fact in the last 15 yrs Lorillard's market share was between 7 and 10%, however sales are decreasing and Lorillard sales are down 6% from 1999. One reason is that competition is selling cheaper and Lorillard cannot lower prices because of the M.S.A. obligation. In overall ranking with the other defendants, Mr. Orlowsky says Lorillard is #4 out of 5 with 9 to 10% of the Florida market and Florida is 5% of Lorillards sales.

Mr. Orlowsky says financial reports are important because it tells the financial position of the company at a given point in time. It reflects assets minus liabilities to determine net worth. For the year 1999, Lorillards balance sheet showed

assets at $2.208.7 billion and liabilities of $1.287.5 billion, resulting in a net worth of $921,205 million.

Mr. Orlowsky further said that the company does not have the net worth money to pay out a debt, and to pay out the entire net worth, Lorillard would have to sell off all assets, pay all debts, and in essence, sell the business. Lorillard cannot borrow additional money — Mr. Orlowsky said he contacted a bank for a loan but was rejected. If any new obligations were imposed on the company, such as a large punitive damage award, Mr. Orlowsky said Lorillard would go out of business. He also said that the most accurate way to determine what a company can pay today is its net worth — not based on future income.

Mr. Orlowsky opined that what Philip Morris paid for three Liggett brands has nothing to do with the value of Lorillard and should not be used in valuing Lorillard. He said that in 1995 Lorillard offered Brown and Williamson $35.9 million for a little over 1% of the market share for 3 or 4 B & W brands, and based on about $36 million for 1% market share Lorillard would be worth $360 million using Mr. Cherners method. However that is only 1/3 of the net worth reflected on Lorillard's currant balance sheet.

With reference to the MSA, Mr. Orlowsky said Lorillards obligation for the first 25 years is $25-$30 billion. Annual payments are between $1.3 and $1.5 billion, and Lorillard has paid $1.7 billion to date.

On another note, Mr. Orlowsky said Lorillard's total advertising budget in 1998 was $43 million, but in 1999 it dropped to $18 due to the MSA. This however resulted in a savings of $25 million because of the billboard restrictions of the agreement and that money is now being used for magazine advertising. He also said that in 1999 Lorillard spent $7.7 million to advertise cigarettes and $8.4 million for youth prevention. He did say in a deposition however, that the company spent $12 Million for youth prevention and $250

million for advertising and promotion in 1999. Lumping advertising and promotion reveals that youth prevention is only 5%-6% of Lorillard's budget. According to Mr. Orlowsky, at the time of the settlements, if business stayed constant, Lorillard could afford the payments without going out of business. Lorillard knew they would have to raise prices to make the payments-in effect they mortgaged the business. The difference between the Government proposed settlement and the M.S.A. was that under the Government proposal, punitive damages would be capped which would have allowed the companies to stay in business with some degree of stability because it eliminated lawsuit liability even if it cost $100 billion dollars more than the MSA.

Mr. Orlowsky said that in 1999 Lorillard took in less than $4 Billion in sales revenue which included $600 million in Federal excise taxes-therefore revenue was not all profit. However if punitive damages exceed net worth, Lorillard will go out of business.

On examination, Mr. Orlowsky admitted that Lorillard has not yet had to pay any judgement in a lawsuit involving smoking and health. He also admitted that net income rose about 85% from 1998 to 1999 ($352 million to $652 Million) and revenue increased 41%.

In 1997 Lorillard paid dividends to Lowes (parent), of $100 million, in 1998 $450 million and in 1999 $300 million. In 1999 Lorillard retained what was left in 1999 after paying Lowes $300 as part of assets and used the money to buy $759 million of marketable securities.

According to Mr. Orlowsky, Lorillards net worth is $921 million.

SUMMARY

This then was a summary of the financial testimony of the C.E.O.'s of the various defendants. They also spent hours, and in some cases days, discussing how their individ-

ual company has changed attitudes and procedure and how each company has implemented anti-youth smoking programs costing millions of dollars. It should be noted, if not stated already, that despite the huge obligations the individual defendants have under the M.S.A. and the FSA, those payments, amounting to 22 billion dollars or more, have been made by the defendants after raising the price of cigarettes sufficiently to generate such sums, and without having to make any outlay of monies from their own pockets. The consumer or smoking public has so far, because of the price increase, been the source of funds for those huge payments.

That means that despite the shift in market share or profit margins as a result of the price increase, the tobacco companies were in no worse financial shape than they were before the M.S.A. or FSA for all intent and purposes.

One thing the C.E.O's did say was that they no longer challenge the Surgeon General's, Public Health or Scientific Communities position on generic causation and the ill effects of tobacco, and have now embarked, via the Internet, on a concentrated effort to educate the public about the good qualities of the industry and their individual company, and the dangers of youth smoking.

ISSUES

The question to be answered therefor, is whether the amount of the punitive damage award, considered in the light of the evidence of (1) the behavior of the defendants, and (2) the ability of the defendants to pay, is unreasonable.

As to the first issue — *behavior of the defendants* — this Court has no problem accepting the rational of the jury who heard all the evidence, that the award is warranted because of the behavior of the defendants. In other words, the Conscience of the Court is **NOT SHOCKED** either by the fact that an award was made, nor by the amount of the award ren-

dered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

The second issue — *ability to pay* —, gives the Court far more difficulty in making a determination.

The testimony at trial on this issue ranged from the low end, the suggested punitive damage award figures by the various defendants, to the high end, the estimated total worth of the defendant companies which at least one plaintiffs expert said, could exceed 200 Billion dollars. Although the individual C.E.O's testified that if an award, in the amount of, or exceeding the defendants estimated individual "net worth," was rendered by the jury, it would put them out of business, these comments were mere "naked statements" without any proof or evidence submitted that such a condition would result. It seems to this Court that not only does the defendant have the burden of proving it's net worth, it also has the burden to show, with proof, that it will go out of business if a punitive damage award reaches a certain level. It is not the burden of the plaintiffs to establish that the defendants have the financial ability to pay a specific punitive damage award. Denis Rety v. Arthur Green and Southern Commodity Corp., 546 So. 2nd 410 (Fla. 3rd DCA 1989). A mere statement to the effect that in a C.E.O.'s opinion, a company will go out of business or be bankrupt, is not sufficient without more. Remember, the defendants, although they had listed several financial expert witnesses in their pretrial documents, declined to call any of them, nor did they see fit to call any company financial officer or consultant. This record, therefore, is devoid of such proof. Conversely, the Plaintiffs experts did not present any proof that if a punitive damage award was the same or close to the experts estimated total worth figures, the Defendants would not got out of business. However, as explained in the "Rety" case, this is not the Plaintiffs burden.

The Court is then left with a seemingly impossible task, trying to determine at what level a punitive damage award

will put any of the defendants out of business. There are no figures which have been submitted as proof, that will aid the Court — only conjecture and supposition. It is easy for a C.E.O. to say that a company will go out of business if it has to pay a certain amount of money-but will it **really** go out of business.? Some of the testimony in this case was to the effect that in the world of high finance, there are many ways to leverage large loans or financial support to bail out a company in trouble and keep that company from going under. Plaintiffs experts explored that avenue, and even though some of the defendant C.E.O.'s testified that they tried to obtain loans from one or more banks or financial institutions and were unsuccessful, there was no **proof** of that submitted. The language of Inter Union of Operating Engineers v. Lassiter, 295 So.2nd 634 (Fla 4th DCA 1974) rev'd on Other grounds 314 So 2nd 761 (Fla 1975) is some what helpful in this regard.

> ". . . the term (financial resources) gives the trial judge a more *liberal standard* to determine whether a given proffer of evidence is relevant and material. For instance, there could well be, and properly so, proof as to income, cash flow, expenses, anticipated income, anticipated diminution of income, anticipated casualties...these items, among others of like moment, would be receivable **in addition** to net worth figures under the scope of *financial resources*. All of this material, including the reflection of net worth, goes to make up a defendants financial resources which the jury is entitled to consider in assessing punitive damages as commanded in Florida Standard Jury Instruction 6.12" " (emphasis added.)

What really needs to be determined then is what is the meaning of "net worth". Most commonly "net worth" is referred to as the difference between assets and liabilities, however this can be misleading because, as the evidence in

this trial pointed out, a "net worth" statement or report is only a snapshot of a moment in time and not an indicator of true worth or value. If what the courts are really interested in is whether a particular defendant has the capability of paying a large punitive damage award, then it is more than reasonable to look to that defendants **actual** worth or value, and not a "snapshot in time". The financial experts in this case testified that in valuing a company one must take into consideration many things other than "net worth". The financial resources of a company then is the best indicator of the condition of a company in determining its true value or worth. There was ample testimony in this case of the "financial resources" available to these companies to enable the experts to reach opinions as to each defendants actual worth,: ergo; a defendants ability to pay beyond a bare recitation of currant net worth!.

The experts testified, for example, that although Philip Morris declared a net worth of only $6.4 Billion dollars, the companies true value or worth was in the neighborhood of $75 Billion dollars when the company's "financial resources" were taken into consideration. There is obviously a huge gap between the two figures which then confuses the issue of when a company such as Philip Morris will have to go into bankruptcy in order to pay a punitive damage award.

It should be noted here that this Court is mindful of the line of cases that involve the issue of whether punitive damages that will result in bankruptcy or putting a defendant out of business, should be allowed, Arab Termite $ Pest Control v. Jenkins 409 So. 2nd 1039 (Fla_ 1982), Brooks v. Rios 707 So 2nd 374 (Fla 3rd DCA 1998) and Hockensmith v. Waxler, 524 So 2nd 714 (Fla 2nd DCA 1988),to name a few, However, none of these cases involve the kind of situation we find ourselves facing in this class action lawsuit. In those cases there was either unrebutted evidence of net worth, or the lack of evidence of net worth. What we have in the instant case, is a conflict in the evidence of net worth and actual worth. That

is to say, a conflict in what a company claims its net worth is, and what an opposing expert says the company's net worth **really** is. Without a clear delineation or resolution of that conflict, it is hardly possible to determine the fine line of bankruptcy or "going out of business" without indulging in the purest of speculation.

The jury heard all of this evidence-they were exposed to the same testimonial conflicts about whether a company will go "bankrupt" or "go out of business" as the Court heard. In fact the jury was informed of their duty, in deciding this case, that they must award an amount of money without financially destroying or bankrupting the defendant. (see Jury Instructions Phase IIB page 10). Was the jury in any less or better a position to make that determination than the Court, given the testimony and evidence presented?. The law, as we know, dictates that the Court shall not allow a verdict that will financially destroy or bankrupt a defendant. In this case who is to say what will or will not bankrupt a defendant or put them out of business? — the evidence certainly is not dispositive of that issue-therefore that decision will have to be made on speculation and conjecture in this particular case since there is no definable threshold available.

If one takes the defendants position that the threshold on this issue is the "currant net worth", then by implication, the Court must reject the testimony of the experts, accept at face value the position of the defendants, and disregard all testimony to the contrary. If that be the case, then there was no need for the Plaintiffs expert witnesses to testify that they disagree with the defendants figures. Under that scenario, the Court would disregard the Plaintiffs experts testimony that the true"currant net worth" must include financial resources, and accept the defendants position at face value . This would be not only unfair, but also erroneous. This is one step this Court declines to take. There was, in this Courts opinion, insufficient evidence presented at trial, to determine that one or more of the defendants will go out of

business or into bankruptcy just because they say they will. That's almost akin to asking a defendant who has just been convicted of a crime , how much of a sentence he feels he would like to serve without it having an adverse effect on him.

The Jury heard all of the testimony and saw all the evidence from both sides, and more important, the Jury heard the arguments of council at the close of the case before they rendered their verdict. If the jury heard what the Court heard, and there is insufficient evidence to establish that one or more defendant will go out of business or go into bankruptcy, and if the Jury would have to speculate on that threshold issue, just as the Court would have to speculate, then in the absence of sufficient proof, how can, or even why should the Court overrule the Jury verdict and grant a remittitur?

There is also the issue of what punitive damages is all about. Succinctly, punitive damages should punish a defendant and act as a deterrent to future behavior. Punishment in this context means to cause some "hurt' to the defendant (in this case monetary hurt), that will send him or it a message. If a monetary sanction was imposed that caused no "hurt" then the purpose of the punitive award is negated. Continuing with this thought, and harking back to what has been said about the way the defendants have financed their obligations under the M.S.A. and the FSA, if a punitive damage award was imposed upon the defendants that they could satisfy by simply raising the price of their products, then what has been accomplished in this case

This Court is not of the opinion that just because we are talking about vast sums of money, that there automatically has to be a remittitur. This Court after very careful consideration, in good conscience really could not set a figure ,or a level, at which a remittitur could be set without indulging in the sheerest of speculation. To do so would be nothing more than engaging in an arbitrary exercise, given the state of the

evidence or lack thereof.. To remit to the level that the defendants have espoused (their net worth statement) would be wrong as explained above. The Court feels it best to consider the level found by the jury who, as the court has said many times herein, heard the same testimony and evidence as the Court.

It should be noted here that this Court has carefully considered the criteria dictated in F.S.A. Sec 768.74(5) and has determined that:

1. This jury after sitting for two solid years in trial, did not evince any prejudice, passion or corruption in rendering its verdict. The jury had to render three separate verdicts in this cause-each one was derived after an enormous amount of evidence was presented, and in this Courts opinion, each verdict comported with the evidence adduced at trial.

2. Again, after sitting for two solid years in trial, it is inconceivable that this jury ignored or misconceived the evidence or the merits of the case. The Court observed the jury taking careful notes during the trial — in fact filling several notepads in most cases, and being attentive throughout.

3. In reaching its verdict in this case, the jury was exposed to a great deal of testimony regarding the activities, and the financial condition of the various defendants. The evidence of financial condition was discussed by two Plaintiffs experts, and at least five C.E.O.'s of the defendant companies. It was highly complex, but did cover a range of amounts and economic theories from which the jury could make a decision.

4. This was a class action case, in which the issue of punitive damages was determined in the aggregate for the entire class which, the evidence indicated, could be as high as several hundred thousand people. Although the compensatory damage claim was tried for only three class representatives, the awards amounted to approximately 12.7 million dollars. Extrapolating that figure to the overall size of the class re-

sults in an extraordinarily high figure, therefore, one can say there is a reasonable relationship to damages proved and the injuries suffered, but more important, the award is in keeping with the degree of the wrongful conduct without sending the defendant into bankruptcy.

5. In the Courts opinion, the amount of the jury verdict is within the parameters of the evidence at trial-within the limits of the highs and the lows, albeit on the high side, but when the enormity of the facts and issues of this case are considered, the award cannot be said to be unreasonable.

Therefore; Defendant's Motion for Remittitur or New Trial, is DENIED.

WHEREFORE, IT IS ORDERED AND ADJUDGED as follows:

1. Class Representative Mary Farnan shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $2,850,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

2. Class Representative Frank Amodeo shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $5,831,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

3. Class Representative Ralph Della Vecchia, as surviving spouse of Angie Della Vecchia, deceased, shall recover

from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $1,500,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

4. James Della Vecchia, as surviving minor son of Angie Della Vecchia, deceased, shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $2,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

5. The Estate of Angie Della Vecchia shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $523,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

6. The Florida Class shall recover from Defendant Philip Morris, Incorporated the sum of $73,960,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

7. The Florida Class shall recover from Defendant R.J. Reynolds Tobacco Company the sum of $36,280,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

8. The Florida Class shall recover from Defendant Brown & Williamson Tobacco Corporation, individually and

as successor by merger to the American Tobacco Company, the sum of $17,590,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

9. The Florida Class shall recover from Defendant Lorillard Tobacco Company/Lorillard, Inc., the sum of $16,250,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

10. The Florida Class shall recover from Defendant Liggett Group, Inc./Brooke Group Holding, Inc., the sum of $790,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

11. The Florida Class shall recover from Defendant Council for Tobacco Research, the sum of $1,195,210 that shall bear interest at the rate of 10% a year, for which let execution issue.

12. The Florida Class shall recover from Defendant Tobacco Institute, the sum of $278,339 that shall bear interest at the rate of 10% a year, for which let execution issue.

True copies of the written Verdicts in Phases I, II and II-B are attached hereto.

All sums payable to the Florida Class shall be paid to the Registry of the Dade County Circuit Court and will be maintained for the benefit of the Florida Class.

This Court reserves jurisdiction to award attorneys fees to Class Counsel, Stanley and Susan Rosenblatt and to award costs.

This Court further reserves jurisdiction to enforce the terms of this Final Judgment Nunc Pro Tunc, to supervise the maintenance and disposition of the punitive damage fund to class members and to enter any further Orders and conduct further proceedings pursuant to the Mandate of the Third District Court of Appeal of Florida.

DONE AND ORDERED at Miami, Dade County, Florida this _7_ day of ***NOVEMBER*** in the year **2000**.

/s/ Robert P. Kaye
Judge Robert P. Kaye
Circuit Judge

cc: All Counsel of Record

APPENDIX D

[Order of the Supreme Court of Florida on Rehearing, (December 21, 2006)]

Supreme Court of Florida

THURSDAY, DECEMBER 21, 2006

CASE NOS.: SC03-1856

Lower Tribunal Nos.: 3D00-3400
3D00-3206
3D00-3207
3D00-3208
3D00-3210
3D00-3212
3D00-3215

HOWARD A. ENGLE, M.D., ET AL.	vs. LIGGETT GROUP INC., ET AL.
Petitioner(s)	Respondent(s)

The motions for rehearing filed by the petitioners and Liggett Group, LLC., are hereby denied. Respondents' motion for rehearing is hereby granted in part and denied in part, and the opinion issued July 6, 2006, is hereby withdrawn. The opinion dated December 21, 2006, is issued in lieu thereof and has been revised as follows: The Court upholds the Phase I finding in favor of the Engle Class on Question 7 (breach of express warranty). However, the Court's determination that the fraud and misrepresentation finding in Question 4 cannot stand, necessarily invalidates the conspiracy to misrepresent finding in Question 5. The Court also corrects a misstatement regarding one of the jury's findings as to class representative Della Vecchia. The opinion has been revised on pages 4, 6, and 5253, and these revisions are set forth in bold and strike-through below:

This same majority concludes that it was proper to allow the jury to make findings in Phase I on Questions 1 (general causation), 2 (addiction of cigarettes), 3 (strict liability), 4(a) (fraud by concealment), ~~5 (civil conspiracy misrepre-~~

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~~sentation),~~ 5(a) (civil-conspiracy-concealment), 6 (breach of implied warranty), 7 **(breach of express warranty)**, and 8 (negligence). Therefore, these findings in favor of the Engle Class can stand. The Court unanimously agrees that the nonspecific findings in favor of the plaintiffs on Questions 4 (fraud and misrepresentation) and 9 (intentional infliction of emotional distress) are inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause. Therefore, these findings cannot stand. **Because the finding in favor of the plaintiffs on Question 5 (civil conspiracy-misrepresentation) relies on the underlying tort of misrepresentation, this finding also cannot stand.**

....

... The jury specifically found that her ~~conditions were~~ **lung disease was** caused by smoking....

....

We approve the Phase I findings for the class as to Questions 1 (that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer), 2 (that nicotine in cigarettes is addictive), 3 (that the defendants placed cigarettes on the market that were defective and unreasonably dangerous), 4(a) (that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both), ~~5 (that all of the defendants agreed to misrepresent information relating to the health effects of cigarettes or the addictive nature of cigarettes with~~

~~the intention that smokers and the public would rely on this information to their detriment)~~, 5(a) (that the defendants agreed to conceal or omit information regarding thehealth effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment), 6 (that all of the defendants sold or supplied cigarettes that were defective), (7) (**that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants**), and 8 (that all of the defendants were negligent). Therefore, these findings in favor of the Engle Class can stand.

NO FURTHER MOTIONS FOR REHEARING WILL BE ENTERTAINED BY THIS COURT.

LEWIS, C.J., and ANSTEAD, PARIENTE, and QUINCE, JJ., concur.

WELLS and BELL, JJ., would grant the motion of Liggett Group LLC and would grant the motion of the other respondents on all points.

CANTERO, J., recused.

APPENDIX E

[Certain Defendants' Proposed Jury Instruction on Preemption in the Circuit Court for Dade County, Florida (June 14, 1999)]

DEFENDANTS' PROPOSED INSTRUCTION ON PREEMPTION

Throughout the trial, you have occasionally heard the Court or the lawyers mention the word "preemption." "Preemption" is a doctrine of federal law that limits the claims that plaintiffs can make in this case. You need to understand this limitation in order to perform your duties as jurors.

The doctrine of preemption arises from the federal law enacted by the United States Congress on July 1, 1969, in which Congress mandated that every pack of cigarettes bear a specific warning label written by Congress itself. Later, Congress required that those same warning labels appear on each cigarette brand advertisement.

Congress determined that the federally mandated warnings were sufficient to warn consumers about the risks of smoking. Congress therefore prohibited any person, from July, 1969, forward, from claiming or suggesting that consumers should be provided any additional information or warning beyond the warnings on the packs of cigarettes. Congress also provided that, as long as the packs of cigarettes bear the federally mandated warning, cigarette advertising from July 1, 1969, forward cannot be the subject of any claim that the advertising undermined or neutralized the warnings or made them less effective.

In this case, plaintiffs have from time to time claimed or suggested that smokers were not aware of certain information or should have been provided certain information. To the extent that any such claim or suggestion related to periods after July 1, 1969, I hereby instruct you that any such claim is preempted and that you should ignore and not consider any evi-

dence, answer or question claiming or suggesting that additional information should have been provided after July 1, 1969.

I instruct you that plaintiffs are not permitted to claim and you are not permitted to find that, after July 1, 1969, defendants should have provided additional information to consumers concerning the health effects of smoking. By "health effects," I mean to include addictions as well as the illnesses that plaintiffs claim are caused by smoking. Accordingly, plaintiffs cannot base any claim on, and you may not find defendants at fault for, not providing additional information or warning to the public after July 1, 1969, about the relationship between smoking and health.

I further instruct you that you cannot consider and must ignore any claim or suggestion by plaintiffs that defendants, at any time after July 1, 1969, concealed or hid from class members scientific or other knowledge or information relating to smoking and health, including information concerning the health effects of cigarette smoking, concerning cigarette ingredients or smoke constituents, or concerning the alleged addictiveness of nicotine.

From time to time in this case, plaintiffs have claimed or suggested that cigarette advertising undermined awareness of the risks of smoking, or was too attractive or too effective or glamorized smoking or other such similar claims. The plaintiffs have also claimed that defendants' advertisements and promotions were intended to encourage young people, members of ethnic minority groups, or other s to start smoking. Defendants have offered testimony and evidence that they do not market to youths or non-smokers. I here instruct you to ignore any such claims or suggestions or evidence regarding any of these activities after July 1, 1969.

APPENDIX F

[Phase I Verdict Form (July 7, 1999)]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA-22

HOWARD A. ENGLE, M.D., et al.,
Plaintiffs,
v.
RJ REYNOLDS TOBACCO COMPANY,
et al.,
Defendants
_____/

VERDICT FORM FOR PHASE I

We, the Jury, return the following Verdict:

Question No. 1

[Generic Causation]

Does smoking cigarettes cause one or more of the following diseases or medical conditions?

Aortic Aneurysm	Yes X	No ___
Asthmatic Bronchitis, as related to COPD	Yes ___	No X
Bladder Cancer	Yes X	No ___

Cerebrovascular Disease (including Stroke)	Yes X	No ___
Cervical Cancer	Yes X	No ___
Chronic Obstructive Pulmonary Disease-COPD (including Emphysema)	Yes X	No ___
Coronary Heart Disease (including cardiovascular disease, hardening of the arteries, atherosclerosis, coronary artery disease and arteriosclerosis, angina, abnormal blood clogging, blood vessel damage, myocardial infarction (heart attack))	Yes X	No ___
Esophageal (Throat) Cancer	Yes X	No ___
Infertility	Yes ___	No X
Kidney Cancer	Yes X	No ___
Laryngeal (Throat or Voice Box) Cancer	Yes X	No ___
Lung Cancer	Yes X	No ___
Adenocarcinoma	Yes X	No ___
Bronchioloalveolar carcinoma	Yes ___	No X
Large cell carcinoma	Yes X	No ___
Small cell carcinoma	Yes X	No ____
Squamous cell carcinoma	Yes X	No ____
Complications of Pregnancy (miscarriage)	Yes X	No ___
Oral Cavity/Tongue Cancer	Yes X	No ___
Pancreatic Cancer	Yes X	No ___
Peripheral Vascular Disease (including Buerger's Disease)	Yes X	No ___

Pharyngeal Cancer	Yes X	No ___
Stomach Cancer	Yes X	No ___

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to any of the above questions, please answer the following questions:

Question No. 2

[Addiction Dependence]

Are cigarettes that contain nicotine addictive or dependence producing?

Yes X No __

Question No. 3

[Strict Liability]

Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective and unreasonably dangerous?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X	No ___
Before July 1, 1974	Yes __	No ___
After July 1, 1974	Yes __	No ___
Both before and after July 1, 1974	Yes X	No ___
RJ Reynolds Tobacco Company	Yes X	No ___
Before July 1, 1974	Yes __	No ___
After July 1, 1974	Yes __	No ___
Both before and after July 1, 1974	Yes X	No ___

Brown & Williamson Tobacco Corporation	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes ___	No ___
Both before and after July 1, 1974	Yes X	No ___
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes ___	No ___
Both before and after July 1, 1974	Yes X	No ___
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes ___	No ___
Both before and after July 1, 1974	Yes X	No ___
Liggett Group, Inc.	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes ___	No ___
Both before and after July 1, 1974	Yes X	No ___
Brooke Group, Ltd., Inc.	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes X	No ___
Both before and after July 1, 1974	Yes ___	No ___

Question No. 4

[Fraud and Misrepresentation]

Did one or more of the Defendants make a false statement of a material fact, either knowing the statement was

false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __
RJ Reynolds Tobacco Company	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __
Brown & Williamson Tobacco Corporation	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __

Liggett Group, Inc.	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes X	No __
Both before and after May 5, 1982	Yes __	No __
Council for Tobacco Research-U.S.A.	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __
Tobacco Institute	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __

Question No. 4a

[Fraud by Concealment]

Did one or more of the Defendants conceal or omit material information, not otherwise known or available, knowing the material was false or misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X	No __

Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
RJ Reynolds Tobacco Company	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Brown & Williamson Tobacco Corporation	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Liggett Group, Inc.	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Brooke Group, Ltd., Inc.	Yes X	No ___
Before May 5, 1982	Yes ___	No X

After May 5, 1982	Yes X	No __
Both before and after May 5, 1982	Yes __	No __
Council for Tobacco Research-U.S.A.	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __
Tobacco Institute	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __

Question No. 5

[Civil Conspiracy-Misrepresentation]

Did two or more of the Defendants enter into an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment.?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes X	No __
RJ Reynolds Tobacco Company	Yes X	No __
Brown & Williamson Tobacco Corporation	Yes X	No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No __
Liggett Group, Inc.	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __

Council for Tobacco Research-U.S.A.	Yes X No __
Tobacco Institute	Yes X No __

Question No. 5a

[Civil Conspiracy-Concealment]

Did two or more of the Defendants enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment.?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes X No __
RJ Reynolds Tobacco Company	Yes X No __
Brown & Williamson Tobacco Corporation	Yes X No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X No __
Liggett Group, Inc.	Yes X No __
Brooke Group, Ltd., Inc.	Yes X No __
Council for Tobacco Research-U.S.A.	Yes X No __
Tobacco Institute	Yes X No __

Question No. 6

[Breach of Implied Warranty]

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer

whether the conduct occurred during any of the following time periods:

Philip Morris, Incorporated	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
RJ Reynolds Tobacco Company	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Brown & Williamson Tobacco Corporation	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Liggett Group, Inc.	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __
Before July 1, 1969	Yes __	No X
July 1, 1969 thru July 1, 1974	Yes __	No X
After July 1, 1974	Yes X	No __

Question No. 7

[Breach of Express Warranty]

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said Defendant(s), either orally or in writing?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
RJ Reynolds Tobacco Company	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Brown & Williamson Tobacco Corporation	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No __

Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Liggett Group, Inc.	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __
Before July 1, 1974	Yes ___	No X
After July 1, 1974	Yes X	No __
Both before and after July 1, 1974	Yes ___	No __

Question No. 8

[Negligence]

Have Plaintiffs proven that one or more of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
RJ Reynolds Tobacco Company	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __

Brown & Williamson Tobacco Corporation	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
Liggett Group, Inc.	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes X	No __
Both before and after July 1, 1969	Yes ___	No __

Question No. 9

[Intentional Infliction of Emotional Distress]

Have Plaintiffs proven that one or more of the Defendant Tobacco Companies engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold

or supplied to Florida smokers with the intent to inflict severe emotional distress?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes X No __
RJ Reynolds Tobacco Company	Yes X No __
Brown & Williamson Tobacco Corporation	Yes X No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X No __
Liggett Group, Inc.	Yes X No __
Brooke Group, Ltd., Inc.	Yes X No __

Question No. 10

[Entitlement to Punitive Damages]

Under the circumstances of this case, state below whether the conduct of any Defendant rose to a level that would permit a potential award or entitlement to punitive damages.

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes X No __
RJ Reynolds Tobacco Company	Yes X No __
Brown & Williamson Tobacco Corporation	Yes X No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X No __
Liggett Group, Inc.	Yes X No __
Brooke Group, Ltd., Inc.	Yes X No __
Council for Tobacco Research-	Yes X No __

U.S.A.
Tobacco Institute Yes X No __

SO SAY WE ALL, this 7th day of July, 1999

/s/ Leighton Anthony Finegan
FOREPERSON

APPENDIX G

Post-*Cipollone* Decisions Addressing Preemption of "Concealment" and "Neutralization" Claims

Federal Cases:

Brown v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 394 (5th Cir. 2007) ("Because a concealment claim relies, by its nature, on an unfulfilled duty to disclose additional information, it would seem unavoidably to impose a state law requirement as to marketing and advertising related to smoking and health.")

Rivera v. *Philip Morris, Inc.*, 395 F.3d 1142, 1147 (9th Cir. 2005) (holding failure-to-warn and fraudulent concealment claims not preempted to the extent that they rely on channels of communication other than "advertising or promotion")

Spain v. *Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1200-02 (11th Cir. 2004) (holding that *Cipollone* requires preemption of claims of "fraudulent suppression" and conspiracy to fraudulently misrepresent the dangers of cigarettes, but adding that "insofar as the claim is premised on the allegation that defendants made statements knowing their falsity, or with reckless disregard as to their truth or falsity, it is not preempted by the Labeling Act")

Glassner v. *R.J. Reynolds Tobacco Co.*, 223 F.3d 343 (6th Cir. 2000) (holding that "claims of fraud based upon fraudulent misrepresentation and concealment are preempted to the extent that they are predicated on a duty to issue additional or clearer warnings through advertising and promotion")

Allgood v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996) ("To the extent that plaintiffs' claims are based on fraudulent concealment or a failure to warn after 1969, they are preempted by the Federal Cigarette Labeling and Advertising Act.")

Hearn v. *R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1112 (D. Ariz. 2003) (holding that concealment claims are preempted only if based on non-disclosure through advertis-

ing channels; "fraudulent concealment claims are not preempted to the extent that they rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion")

Waterhouse v. *R.J. Reynolds Tobacco Co.*, 270 F. Supp. 2d 678, 684 (D. Md. 2003) (finding fraudulent concealment claim preempted as "nothing more than a failure-to-warn claim in different dress")

DeLuca v. *Liggett & Myers Inc.*, No. 00 C 7781, 2003 WL 1798940, at *3 (N.D. Ill. Apr. 4, 2003) (finding fraudulent concealment claims preempted because of lack of duty to disclose independent of sales, marketing, and promotion channels)

Izzarelli v. *R. J. Reynolds Tobacco Co.*, 117 F. Supp. 2d 167, 175 (D. Conn. 2000) ("[*Cipollone*] held that claims of fraudulent misrepresentation and concealment based on a state law duty to disclose facts through channels other than advertising and promotion are not preempted.")

Wright v. *Brooke Group Ltd.*, 114 F. Supp. 2d 797, 825 (N.D. Iowa 2000) ("[T]his court finds that Wright's post-1969 claim of fraud based upon concealment is preempted to the extent that it is predicated on a duty to issue additional or clearer warnings through advertising and promotion.")

Blue Cross & Blue Shield of New Jersey v. *Philip Morris*, 113 F. Supp. 2d 345 (E.D.N.Y. 2000) (holding that claims based on theories of fraudulent concealment, nondisclosure, and omission of information were not preempted).

Falise v. American Tobacco Co., 94 F. Supp. 2d 316, 356-57 (E.D.N.Y. 2000) (reading *Cipollone* not to preempt common-law fraud claims alleging "false representation[s] of [ ] material fact[s]" and "concealment of [ ] material fact[s]").

Barnes v. *Philip Morris Inc.*, No. 98-106 (E.D. Ky. Mar. 24, 1999) ("[Plaintiff's] negligent concealment claim is preempted because [plaintiff] fails to demonstrate, and the Court cannot identify, any duty in Kentucky to disclose information

through channels of communication other than advertising or promotion.")

Romine v. *R.J. Reynolds Tobacco Co.*, No. 4:98-CV-424 (LR-C-98-424), 1999 U.S. Dist. LEXIS 6864, at *4-*5 (E.D. Ark. Mar. 19, 1999) ("Plaintiff alleges that Defendants' failure to provide enhanced warnings contributed to his continued smoking that eventually culminated in his lung cancer, throat cancer, and emphysema. The only way for Defendants to have avoided any liability under this claim would have been to disclose the ingredients of their cigarettes. This would clearly be a requirement 'based on smoking and health.'") (citations omitted)

LaBelle v. *Brown & Williamson Tobacco Corp.*, C.A. No. 2:98-3235-23, 1999 WL 33591435, at *5 (D.S.C. March 18, 1999) (holding that "plaintiff's [fraud] claim is only pre-empted to the extent that it relies on those other general allegations of concealment of information relating to smoking and health")

Stewart v. *R.J. Reynolds Tobacco Co.*, No. 4:98-CV-425 (LR-C-98-425), 1999 U.S. Dist. LEXIS 6858 (E.D. Ark. Mar. 8, 1999) (same order as *Romine*)

Boerner v. *Brown & Williamson Tobacco Co.*, 126 F. Supp. 2d 1160, 1171 (E.D. Ark. 1999) ("preemption would apply to fraudulent concealment allegations to the extent such a claim alleged neutralization of warnings or non-disclosure of information in cigarette advertising or promotion")

Little v. *Brown & Williamson Tobacco Corp.*, C.A. 2:98-1879-23, 1999 WL 33291385, at *6 (D.S.C. Mar. 3, 1999) ("However, plaintiffs' claims are pre-empted to the extent that they rest on allegations that defendant concealed or failed to disclose information relating to the health effects of smoking. The court recognizes, however, that some courts that have considered the latter issue would disagree.")

Smith v. *Brown & Williamson Tobacco Corp.*, No. 96-0459-CV-W-3, 1999 WL 33944680, at *7 (W.D. Mo. Jan. 29,

1999) (holding that fraudulent concealment claim fell "squarely within the area of preempted claims because it explicitly alleges that Defendant failed to provide sufficient information to the public")

Tucker v. *Brown & Williamson Tobacco Corp.*, No. 98-CV-0655 (W.D. La. Oct. 21, 1998) ("State law claims based upon the failure of a cigarette manufacturer to adequately warn consumers or breach of a duty to warn are generally preempted. Allegations of fraudulent concealment, intentional fraud, and misrepresentation, however, may bring a plaintiff's claim outside the preemption mandated by 15 U.S.C. 1334. As plaintiff has produced no evidence of fraudulent concealment, intentional fraud, and misrepresentation, summary judgment is proper.")

Chutz-Reymers v. *Liggett Group, Inc.*, No. 96-409-CIV-T-24(B) (M.D. Fla. May 22, 1998) (finding claims preempted "to the extent the claims assert a failure to warn through 'other means'" than advertising and promotion)

Levy v. *Brown & Williamson Tobacco Corp.*, No. 96-2280-CIV-T-24(B) (M.D. Fla. Apr. 19, 1998) ("[P]laintiffs' counsel at the hearing seemed to be attempting to present failure to warn evidence in the guise of fraudulent concealment. Consequently, failure to warn claims should be determined to be preempted with respect to all remaining counts of each second amended complaint.")

Durkin v. *Philip Morris Tobacco Corp.*, No. 3:CV-97-0887, 1998 U.S. Dist. LEXIS 21562, at *9 (M.D. Pa. February 17, 1998) ("[T]his court must look beyond the descriptive label a plaintiff attaches to a claim in determining whether or not the claim is preempted. If a plaintiff could assert a duty inconsistent with the Labeling Act merely by styling it 'fraudulent suppression,' the preemption provision of the Labeling Act would be deprived of any meaningful application.")

Sanchez v. *Liggett & Myers, Inc.*, No. C-97-301, 1999 U.S. Dist. LEXIS (S.D. Tex. Jan. 8, 1998) (holding that fraudulent concealment and other claims "are essentially claims alleging

that the Defendants misrepresented and concealed the health risks of cigarette smoking")

Perez v. *Brown & Williamson Tobacco Corp.*, 967 F. Supp. 920, 928 (S.D. Tex. 1997) (holding that Plaintiffs' claims of fraud and misrepresentation are "claims alleging that the Defendants misrepresented and concealed the health risks of cigarette smoking" and are preempted)

Lacey v. *Lorillard Tobacco Inc.*, 956 F. Supp. 956, 963 (N.D. Ala. 1997) (holding that recognizing a duty inconsistent with the Labeling Act merely by calling it "fraudulent suppression" would deprive the Act "of any meaningful application")

Davis v. *Tobacco Co. of Prods.* (Kool, Newport, Pall Mall, Marlboro Cigarettes), No. SA-96-CA-782, 1997 WL 33147703 (W.D. Tex. May 21, 1997) ("All claims of a smoker based upon 'fraudulent concealment or failure to warn after 1969' are preempted by the 'Labeling Act.'")

Whirley v. *American Brands, Inc.*, No. C-97-009, 1997 WL 881215, at *6 (S.D. Tex. Apr. 7, 1997), aff'd per curiam, 139 F.3d 898 (5th Cir. 1998) (holding "that claims based on fraudulent concealment or the failure to warn are preempted by federal law")

Hulsey v. *American Brands, Inc.*, No. C-97-003, 1997 WL 271755, at *3 (S.D. Tex. Apr. 7, 1997) (holding fraudulent concealment claim preempted), aff'd per curiam, 139 F.3d 898 (5th Cir. Mar. 2, 1998)

Burton v. *R.J. Reynolds Tobacco Co.*, 916 F. Supp. 1102, 1104 (D. Kan. 1996) (holding concealment claim not preempted because "Defendants had numerous mediums — other than placing warnings on the product itself * * * — to tell the public of the dangers of smoking")

State Cases:

American Tobacco Co. v. *Grinnell*, 951 S.W.2d 420, 439-40 (Tex. 1997) ("The fraudulent concealment claims are pre-empted because they too are premised on American's failure to disclose information regarding the dangers of cigarettes. This claim is essentially a variation on the Grinnells' failure to warn claim because it is based on American's alleged duty to disclose information about the harmful effects of cigarettes.")

Cantley v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996) ("Because manufacturers in the position of the defendants * * * can ordinarily communicate directly with consumers * * * only through 'advertising or promotion' channels of communication, we must conclude that Cantley's fraudulent suppression claims, as pleaded, are inevitably based upon a 'state law duty to disclose * * * facts through * * * advertising or promotion' channels of communication and, therefore, that they are preempted.") (last two omissions in original)

Bullock v. *Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140, 159 (Cal. App. 2d Dist. 2006) (upholding admission of evidence regarding cigarette advertising that "conveyed the message that smokers were glamorous, healthy, and carefree," reasoning that "the counts for misrepresentation and false promise were based on false statements and a duty not to deceive and therefore were not preempted")

Whiteley v. *Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 832-42 (Cal. App. 1 Dist. 2004) (acknowledging that under *Cipollone* "[l]ine drawing is difficult," but holding that claims alleging "misrepresentation by half-truths" are not preempted because they are more like affirmative fraud claims than failure-to-warn claims)

Laschke v. *Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1078 (Fla. Dist. Ct. App. 2000) ("In addition, we hold that the Laschkes' claim for conspiracy to commit fraud

through concealment, which attempts to allege a duty beyond that imposed by the Labeling Act, is also preempted for acts occurring after 1969.")

State of Idaho v. *Philip Morris Inc.*, No. CV-OC-97-03239D, at *5, *13 (Idaho Dist. Ct. Sept. 2, 1998) ("The Labeling Act also preempts any claims that the Defendants concealed material facts regarding the health consequences of cigarettes in their advertising or promotions.").

Evans v. *Lorillard Tobacco Co.*, 22 Mass. L. Rptr. 91, 2007 WL 796175 (Mass. Super. 2007) (holding that fraudulent concealment claim "is 'predicated not on a duty "based on smoking and health," but rather on a more general obligation — the duty not to deceive'")

Carmichael-Foley v. *R.J. Reynolds Tobacco Co.*, No. 98-3694F (Mass. Super. Ct. Dec. 31, 1999) ("The plaintiff's post July 4, 1969 (effective date of act), failure to warn claims are pre-empted by the Federal Cigarette Labeling and Advertising Act. These include a failure to warn or to disclose information to consumers and an intentional failure to do so (e.g. alleged concealment or suppression.")

Thies v. *American Tobacco Co., Inc.*, No. MID-L-10563-98 MT (N.J. Super. Ct. Law Div. May 23, 2000) (holding that "since the first and third counts challenge defendants' alleged failure to disclose information about the health hazards of cigarettes in what undoubtedly constitutes defendants' advertising and promotion after the 1969 effective date of the Labeling Act, they are preempted")

Tomasino v. *American Tobacco Co.*, 23 A.D.3d 546, 807 N.Y.S.2d 603 (N.Y. App. Div. 2d Dep't 2005) (holding that because "the predicate duty underlying the plaintiff's fraudulent concealment claims is a state-law duty not to deceive * * * the [trial court] improperly held that the post-1969 fraudulent concealment causes of action were preempted by the Act") (internal quotation omitted) (omission in original)

Miele v. *American Tobacco Co.*, 2 A.D.3d 799, 770 N.Y.S. 2d 386 (N.Y. App. Div. 2d Dep't 2003) (holding that "the predicate duty underlying the plaintiff's fraudulent concealment claims is a state-law duty not to deceive")

Small v. *Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 604 (N.Y. App. Div. 1998), aff'd, 698 N.Y.S.2d 615 (1999) ("[P]laintiffs' claims are preempted insofar as they allege fraudulent concealment and failure to warn of the dangers of nicotine, but not insofar as they allege affirmative misrepresentations on which plaintiffs relied to their detriment.")

Inzerilla v. *American Tobacco Co.*, No. 11754/96, 2000WL 34016364, at *8 (N.Y. Sup. Ct. Oct. 27, 2000) ("Pursuant to *Small* v. *Lorillard Tobacco Co[.], Inc.* [*supra*], which interprets the statutory term 'advertising or promotion' of cigarettes in an expansive manner, this court holds that the plaintiff's claim of fraudulent concealment has been federally preempted insofar as it rests on allegations concerning events after 1969.")

Davis v. *Fortune Brands, Inc.*, 187 Misc. 2d 409, 413, 727 N.Y.S.2d 241 (N.Y. Sup. Ct. Sept. 27, 2000) ("If the claim alleges that the defendants were obligated to disclose the concealed facts by means of advertising and promotion, then such claim is pre-empted. However where the 'claims rely on a state-law duty to disclose such facts through channels of communication other than advertising and promotion' those claims are not pre-empted.")

DaSilva v. *American Tobacco Co.*, 667 N.Y.S.2d 653, 656 (N.Y. Sup. Ct. 1997) (finding that *Cipolone* requires preemption of fraudulent concealment claims)